DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 13-9085
Title: Tara Sheneva Williams, Petitioner
v.
Deborah K. Johnson, Acting Warden
Docketed: March 12, 2014
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (07-56127)
Decision Date: July 3, 2013
Rehearing Denied: December 17, 2013

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Mar 7 2014	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 11, 2014)
Mar 25 2014	Waiver of right of respondent Deborah K. Johnson, Acting Warden to respond filed.
Apr 3 2014	DISTRIBUTED for Conference of April 18, 2014.
Apr 14 2014	Response Requested . (Due May 14, 2014)
May 14 2014	Brief of respondent Deborah K. Johnson, Acting Warden in opposition filed.
May 21 2014	Reply of petitioner Tara Sheneva Williams filed.
May 28 2014	DISTRIBUTED for Conference of June 12, 2014.
Jun 16 2014	DISTRIBUTED for Conference of June 19, 2014.
Jun 23 2014	DISTRIBUTED for Conference of June 26, 2014.
Jun 30 2014	DISTRIBUTED for Conference of June 30, 2014.
Jul 1 2014	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. Judgment VACATED and case REMANDED For further consideration of petitioner□s Sixth Amendment claim under the standard set forth in 28 U.S.C. □2254(d).
Aug 4 2014	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

No. 13-9085

Supreme Court, U.S.
FILED
MAY 14 2014
OFFICE OF THE CLERK

In the Supreme Court of the United States

TARA SHENEVA WILLIAMS, *Petitioner,*

v.

DEBORAH K. JOHNSON, ACTING WARDEN, *Respondent.*

CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 33.2(b), I certify that the Respondent's Brief in Opposition to Petition for Writ of Certiorari consists of 15 pages, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 14, 2014
Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California

STEPHANIE C. BRENAN
Deputy Attorney General

Counsel of Record
Counsel for Respondent

51514544.doc

No. 13-9085

In the Supreme Court of the United States

Supreme Court, U.S.
FILED
MAY 14 2014
OFFICE OF THE CLERK

TARA SHENEVA WILLIAMS, *Petitioner*,

v.

DEBORAH K. JOHNSON, ACTING WARDEN, *Respondent*.

CERTIFICATE OF SERVICE BY MAIL

I, Stephanie C. Brenan, Deputy Attorney General, a member of the Bar of this Court hereby certify that on **May 14, 2014**, a copy of the RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI in the above-entitled case was mailed, first class postage prepaid to:

Kurt David Hermansen
Attorney at Law
Law Office of Kurt David Hermansen
550 West C Street, Suite 580
San Diego, CA 92101
(619) 236-8300

Counsel of Record
for Tara Sheneva Williams

Steven M. Klepper, Esq.
Kramon & Graham, P.A.
One South Street
Suite 2600
Baltimore, Maryland 21202
(410) 752-6030

I further certify that all parties required to be served have been served.

STEPHANIE C. BRENAN
Deputy Attorney General
Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2056
Counsel for Respondent

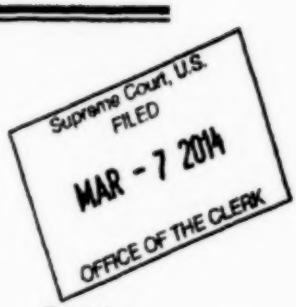
LA2014612586/51514630.doc

13-9085

No. _____

IN THE

Supreme Court of the United States



TARA SHENEVA WILLIAMS,

Petitioner,

v.

DEBORAH K. JOHNSON, Acting Warden,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court: the United States Court of Appeals for the Ninth Circuit, which appointed undersigned counsel pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, on or about July 22, 2009.

KURT DAVID HERMANSEN
LAW OFFICE OF KURT HERMANSEN
550 West C Street, Suite 580
San Diego, California 92101
(619) 236-8300
kdh@kurtdavidhermansen.com

Dated: March 7, 2014

No. _____

IN THE

Supreme Court of the United States

TARA SHENEVA WILLIAMS,

Petitioner,

v.

DEBORAH K. JOHNSON, Acting Warden,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court: the United States Court of Appeals for the Ninth Circuit, which appointed undersigned counsel pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, on or about July 22, 2009.

KURT DAVID HERMANSEN
LAW OFFICE OF KURT HERMANSEN
550 West C Street, Suite 580
San Diego, California 92101
(619) 236–8300
kdh@kurtdavidhermansen.com

Dated: March 7, 2014

13-9085

No. _____

IN THE

Supreme Court of the United States

TARA SHENEVA WILLIAMS,

Petitioner,

v.

DEBORAH K. JOHNSON, Acting Warden,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

STEVEN M. KLEPPER
KRAMON & GRAHAM, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202-3201
(410) 752-6030
sklepper@kg-law.com

KURT DAVID HERMANSEN
Counsel of Record
LAW OFFICE OF KURT HERMANSEN
550 West C Street, Suite 580
San Diego, California 92101
(619) 236-8300
kdh@kurtdavidhermansen.com

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

This petition presents a rare but powerful reason to grant certiorari: the panel majority below has asked this Court to reverse its judgment. In *Johnson v. Williams*, No. 11-465, the Court granted certiorari limited to the warden's Question 1, addressing the appropriate standard of AEDPA review where a state court allegedly overlooked a federal claim. This Court denied certiorari on Question 2, whether Ms. Williams could prevail under deferential review. At oral argument, three justices characterized the state trial court's dismissal of a holdout juror as "troublesome," but recognized that the issue was not before the Court. Reversing and remanding, this Court found that a deferential standard controlled. But the opinion's introduction stated "under that standard respondent is not entitled to habeas relief." Ms. Williams sought rehearing to clarify that the Court was not adjudicating Question 2. The Court denied rehearing. On remand, the Ninth Circuit believed its hands were tied. Chief Judge Kozinski stated: "I hope I'm wrong .... But I take comfort in knowing that, if we are wrong, we can be summarily reversed."

Ms. Williams presents two questions:

1. Did this Court mean to bar a deferential review on remand, or did the denial of rehearing simply reflect that disputes regarding the scope of this Court's mandate are to be resolved on remand?

2. Can the denial of certiorari or the denial of rehearing constitute "certiorari granted" under 28 U.S.C. § 1254, where the Court's opinion contains no discussion of a question outside a limited grant of certiorari?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 10

I. The Mandate Rule Permitted the Ninth Circuit to Conduct a Deferential Analysis. 10

II. This Court Never Asserted Jurisdiction Over the Warden's Question 2. 17

CONCLUSION 23

APPENDIX

A. Per curiam order affirming denial of habeas relief, with two concurring opinions, No. 07-56127 (9th Cir. July 3, 2013) ..... App. 1a

B. Opinion reversing denial of habeas relief, No. 07-56127 (9th Cir. May 23, 2011) ..... App. 7a

C. Judgment, No. CV-03-02691-GW (C.D. Cal. May 30, 2007) ..... App. 51a

D. Order adopting Report and Recommendation, No. CV-03-02691-GW (C.D. Cal. May 30, 2007) ..... App. 52a

E. Magistrate Judge's Report and Recommendation, No. CV-03-02691-GW (C.D. Cal. Mar. 19, 2007) ..... App. 53a

F. Opinion reversing Ninth Circuit's judgment and remanding, No. 11-465 (U.S. Feb. 20, 2013) ..... App. 70a

G. Order granting certiorari limited to Question 1, No. 11-465 (U.S. Jan. 13, 2012) ..... App. 93a

H. Order denying rehearing, No. 11-465 (U.S. Apr. 15, 2013) ..... App. 94a

I. Order denying rehearing, No. 07-56127 (9th Cir. Dec. 17, 2013) ..... App. 95a

J. Order denying rehearing, No. 07-56127 (9th Cir. July 13, 2011) ..... App. 96a

K. Judgment, No. 11-465 (U.S. Feb. 20, 2012) ..... App. 97a

L. Petition for rehearing (U.S. filed Mar. 13, 2013) ..... App. 99a

M. Oral argument transcript, No. 11-465 (U.S. Oct. 3, 2012) (excerpts) ..... App. 105a

N. Warden's Petition for Writ of Certiorari, No. 11-465 (U.S. filed Oct. 10, 2011) (excerpts) ..... App. 118a

TABLE OF AUTHORITIES

Cases

Am. Constr. Co. v. Jacksonville, T. & K.W. Ry. Co., 148 U.S. 372 (1893) 18–19

Barry v. Mercein, 46 U.S. 103, 119 (1847) 18, 22

Caterpillar Inc. v. Lewis, 519 U.S. 61 (1996) 14

City News & Novelty, Inc. v. City of Waukesha, 531 U.S. 278 (2001) 14

Clark v. Propper, 169 F.2d 324 (2d Cir. 1948) 21

Durousseau v. United States, 10 U.S. 307 (1810) 18–19

FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009) 14

FCC v. Pottsville Broad. Co., 309 U.S. 134 (1940) 11

G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) 19

Gertz v. Robert Welch, Inc., 680 F.2d 527 (7th Cir. 1982) 11

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27 (1993) 19

Johnson v. Williams, 133 S. Ct. 1088 (2013) 1, 10

Marbury v. Madison, 5 U.S. 137 (1803) 22

Martin v. Hunter's Lessee, 14 U.S. 304 (1816) 18

McCandless v. Furlaud, 293 U.S. 67 (1934) 19–20

Missouri v. Jenkins, 490 U.S. 1034 (1989) 19

Missouri v. Jenkins, 495 U.S. 33 (1990) 14, 19

Moore v. Anderson, 222 F.3d 280 (7th Cir. 2000) 12

Olmstead v. United States, 277 U.S. 438 (1928) 19–20

Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) 19–21

Propper v. Clark, 337 U.S. 472 (1949) 19–21

Quern v. Jordan, 440 U.S. 332 (1979) 11

Redrup v. New York, 386 U.S. 767 (1967) 19–21

Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999) 21

Rivera Fernandez v. Chardon, 681 F.2d 42 (1st Cir. 1982) 11

Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939) 11

United States v. Apel, 571 U.S. ___ (2014) 14

United States v. Navajo Nation, 537 U.S. 488 (2003) 12, 15

United States v. Navajo Nation, 556 U.S. 287 (2009) 11–15

United States v. Young, 94 U.S. 258 (1876) 18

Williams v. Cavazos, 646 F.3d 626 (9th Cir. 2011) 1

Williams v. Johnson, 720 F.3d 1212 (9th Cir. 2013) 1

Wiscart v. D'Auchy, 3 U.S. 321 (1796) 18

Constitutional Provisions, Statutes, and Rules

43 Stat. 936 (1925) 21

62 Stat. 928 (1948) 21

25 U.S.C. § 399 12–13

28 U.S.C. § 1254 ..... *passim*

28 U.S.C. § 2254 ..... 5, 23

U.S. Const. art. III, § 2 cl. 2 ..... 1, 17–18, 22

U.S. S. Ct. R. 44 16–17

Other Authorities

Lyle Denniston, *Argument recap: Pushing the envelope, needlessly*, SCOTUSBLOG (Oct. 3, 2012, 1:45 PM) 7

Scott Graham, *High Court Gives Ninth Circuit a Habeas Head-Scratcher*, THE RECORDER, July 8, 2013 16

EUGENE GRESSMAN et al., SUPREME COURT PRACTICE (9th ed. 2007) 16

DANA SHILLING, L. DESK BOOK § 24.06 16

CHARLES ALLAN WRIGHT et al., 18B FED. PRAC. & PROC. JURIS. § 4478.3 (2d ed. supp. 2013) 12

PETITION FOR WRIT OF CERTIORARI

Tara Sheneva Williams petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The Ninth Circuit decision under review was reported at *Williams v. Johnson*, 720 F.3d 1212 (9th Cir. 2013) (Appendix A). That decision was on remand from this Court's reported decision in *Johnson v. Williams*, 133 S. Ct. 1088 (2013) (Appendix F), *reh'g denied*, 133 S. Ct. 1858 (2013) (Appendix H). The Ninth Circuit's prior decision was reported at *Williams v. Cavazos*, 646 F.3d 626 (9th Cir. 2011) (Appendix B). The Central District of California opinions and orders were unreported and are attached at Appendices C, D, and E.

JURISDICTION

The Ninth Circuit issued its decision and entered judgment on July 3, 2013. App. 1a–2a. It denied rehearing by order entered December 17, 2013. App. 95a. By filing this petition within 90 days after the latter order, Ms. Williams invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Exceptions Clause provides that, in cases outside the Court's original jurisdiction, "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." U.S. Const. art. III, § 2 cl. 2.

28 U.S.C. § 1254 defines this Courts appellate jurisdiction over decisions of the United States Courts of Appeals:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

STATEMENT

1. One afternoon, Ms. Williams agreed to drive Carde Taylor and Schantel W. around so they could case stores for a potential robbery that was to take place later that night. One store they visited was a liquor store, which Taylor and Schantel entered while Ms. Williams waited in the car. The two emerged a few seconds later, but then Taylor went back in, pointed a gun at the proprietor and, in the course of emptying the cash register, shot and killed him.

Taylor and Ms. Williams eventually admitted to being present and confirmed that Taylor had killed the owner. Ms. Williams told the police that, while she knew Taylor was armed, there had never been a plan to rob the store during daylight hours. Taylor and Ms. Williams were each charged with special-circumstances murder and a firearm enhancement; they were tried separately. After a five-day jury trial, Ms. Williams was found guilty of special-circumstances murder and the firearm enhancement, which resulted in a sentence of life imprisonment without the possibility of parole.

But Ms. Williams was convicted only after the trial court dismissed a known holdout juror (Juror No. 6), and replaced him with an alternate. After two days of deliberations, the jury foreperson delivered two notes to the trial court. The first note referenced California's anti-jury nullification instruction and indicated that one juror had expressed: (1) an intention to disregard the law; and (2) concern relative to the severity of the charge (1st degree murder). The second note asked if it was permissible for a juror to interpret the jury instructions to mean that the conspiracy should involve a plan to commit a specific robbery, rather than a general plan to commit robberies in the future.

The trial judge told the jurors that the answer to note number two was "no." After excusing all the jurors other than the foreperson, the trial judge questioned him about the first note. After confirming that no juror had expressed concern about punishment, the trial judge asked what the foreperson meant by the phrase "has expressed concern relative to the severity of the charge." The foreperson responded that the juror in question "has probably ten or fifteen times in our conversations so far expressed that ... *he does not believe that there's sufficient evidence* .... "

During further questioning by the court, the foreperson indicated that the judge's answer to note number two "may be sufficient to resolve our concern at this time." But the judge, upon the State's motion, and over Ms. Williams' objection, halted jury deliberations and questioned the foreperson again the next day. The foreperson then described comments that Juror No. 6 made during deliberations about historical instances of jury nullification and about the "need for a higher

standard" of proof given the severity of the first-degree murder charge. The foreperson stated that Juror No. 6 had tried to explain "the basis for his reasonable doubt .... "

The judge then questioned Juror No. 6, who confirmed that he was not engaging in jury nullification, but admitted saying during deliberations that given the importance of the case (i.e., the severity of the murder charge) "we should be *very* convinced that if the defendant is found guilty that it is beyond a reasonable doubt." The court asked Juror No. 6 what the difference was between convinced beyond a reasonable doubt and "very" convinced. Juror No. 6 responded that they are the same thing: "[C]onvinced beyond a reasonable doubt is the standard, and I don't think that there is a difference between convinced beyond a reasonable doubt and *very* convinced beyond a reasonable doubt. I think it's the same thing."

The prosecutor asked the court to remove Juror No. 6, and the judge indicated that he was inclined to rule that the juror committed misconduct by applying a higher burden of proof than the law requires and by intentionally withholding information from the court about linking the severity of the charge with the burden of proof. But to develop a "fuller record," the court questioned all remaining ten jurors about Juror No. 6.

After questioning all the jurors, the trial court dismissed Juror No. 6, "not because he's not deliberating and not because he's not following the law," but because he was "biased" because "his mind is bent ... against the prosecution." The

following day, the alternate juror who replaced Juror No. 6 voted with the majority in returning a guilty verdict.

2. Following the exhaustion of Ms. Williams' state court remedies, the Central District of California denied her 28 U.S.C. § 2254 petition for habeas corpus against the warden. App. 51a–68a. On appeal, the Ninth Circuit held that the California Court of Appeal had overlooked Ms. Williams' Sixth Amendment claim, that a *de novo* standard of review applied, and that Ms. Williams was entitled to a new trial under that *de novo* standard. App. 22a–31a. The Ninth Circuit denied rehearing. App. 96a.

The warden petitioned this Court for certiorari, presenting two questions for review:

> 1. Whether a habeas petitioner's claim has been "adjudicated on the merits" for purposes of 28 U.S.C. § 2254(d) where the state court denied relief in an explained decision but did not expressly acknowledge a federal-law basis for the claim.
>
> 2. "Whether, under § 2254, a federal habeas court (a) may grant relief on the ground that the petitioner had a Sixth Amendment right to retain a biased juror on the panel and (b) may reject a state court's finding of juror bias because it disagrees with the finding and the reasons stated for it, even where the finding was rationally supported by evidence in the state-court record.

App. 119a. "The petition for a writ of certiorari [was] granted limited to Question 1 presented by the petition." App. 93a.

3. Nevertheless, in the course of oral argument, four Justices expressed serious concerns regarding Ms. Williams' conviction.

a. Justice Ginsburg first raised such concerns during the warden's argument:

JUSTICE GINSBURG: May I ask you about the underlying claim here? It is quite troublesome. I think this is a state that doesn't allow an *Allen* charge; is that right?

MS. BRENAN: Correct. Correct, Your Honor.

JUSTICE GINSBURG: And the possibility of getting rid of the juror, the hold-out juror, in this way is – is *really troublesome.*

The judge can't give an Allen charge to urge the jury to deliberate further, but can say — now, the judge knows who the hold-out is, and to just dismiss that juror, it is — it is *very troublesome.*

App. 106a–107a (emphasis added).

b. Justice Kennedy echoed those concerns, while recognizing that they were not before the Court:

JUSTICE KENNEDY: Well, I have to — I mean, this takes us into the merits, which is really interesting, but I — *we probably shouldn't go there*, but, as long as we're there for a minute, I agree with Justice Ginsburg. I've never seen a procedure like this.

And I looked — I looked at this — the Federal cases, *Brown* and *Thomas*, that the *Cleveland* court cited. Those ... [were] voir dire, ... not mid-jury.

I just hope this doesn't happen with much regularity. And the fact that the trial judge is upset, that's the reason that you should leave the jury alone, it seems to me. I think it's *very troublesome.*

App. 107a (emphasis added).

c. Next came Justice Sotomayor:

JUSTICE SOTOMAYOR: I must say that, like Justice Kennedy, *I'm deeply troubled* when trial judges intrude in the deliberative processes of juries.

Most of the time when we're assessing bias, we're assessing it on the grounds of extraneous evidence, a juror who has said one thing in voir dire and is now either a convicted felon or introduced extraneous circumstance.

> But the degree of being convinced is the very essence of jury deliberations. *This case is troublesome.*

App. 109a (emphasis added).

d. Finally, during Ms. Williams' argument, Justice Breyer noted that "maybe [the California Court of Appeal] didn't properly state what Federal law is. *Everybody has some concerns about that one.*" App. 111a–112a (emphasis added). Justice Breyer's questioning unambiguously assumed that, although reversal appeared inevitable on Question 1, Ms. Williams could pursue deferential review on remand:

> JUSTICE BREYER: Well, then your claim over in the Ninth Circuit is not that they didn't consider it, but that, rather, they considered it, but no reasonable juror could reach — no reasonable jurist could reach the conclusion that they reached on the issue. *That argument is open to you.*

App. 113a (emphasis added).

These are not out-of-context snippets. The hostility to the warden's substantive position was palpable. *See* Lyle Denniston, *Argument recap: Pushing the envelope, needlessly*, SCOTUSBLOG (Oct. 3, 2012, 1:45 PM) (the warden "probably was lucky that the Court did not grant review of" Question 2"), http://www.scotusblog.com/2012/10/argument-recap-pushing-the-envelope-needlessly/

4. a. Justice Alito's opinion for the Court held that the California Court of Appeal had not overlooked Ms. Williams' claim. App. 70a–85a. The only surprise consisted of 12 words in the opinion's introduction:

> Applying this rule in the present case, we hold that the federal claim at issue here (a Sixth Amendment jury trial claim) must be presumed

> to have been adjudicated on the merits by the California courts, that this presumption was not adequately rebutted, that the restrictive standard of review set out in §2254(d)(2) consequently applies, *and that under that standard respondent is not entitled to habeas relief.* We therefore reverse the judgment of the Court of Appeals.

App. 71a (emphasis added).

Nothing in the body of the Court's opinion, however, even purported to address whether Ms. Williams was entitled to habeas relief under a deferential standard. App. 72a–85a. Section I provided the factual and procedural background. App. 72a–76a. Section II addressed the appropriate legal standard, App. 76a–App. 82a, holding that when "a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits — but that presumption can in some limited circumstances be rebutted." App. 79a. Section III determined that Ms. Williams failed to rebut that presumption. App. 82a–85a. The final paragraph held: "We think it exceedingly unlikely that the California Court of Appeal overlooked Williams' federal claim, and the Ninth Circuit's judgment to the contrary is reversed. The case is remanded for further proceedings consistent with this opinion." App. 85a (emphasis added). There was no section adjudicating the merits of Ms. Williams' constitutional claim. None. No analysis whatsoever.

b. Upon review of the Court's opinion, counsel for both sides conferred, and the warden interpreted the 12 words from the opinion's introduction — "and that under that standard respondent is not entitled to habeas relief" — as precluding the Ninth Circuit from conducting deferential AEDPA review on remand. App. 102a–103a. Ms. Williams petitioned for rehearing, expressing

disagreement with the warden's interpretation but asking the Court to "clarify that on remand the Ninth Circuit should adjudicate Ms. Williams' substantive claim under deferential AEDPA review" and to delete the disputed 12 words from the Court's opinion. App. 103a–104a. This Court summarily denied rehearing, App. 94a, and issued its mandate directing that "[t]he case is remanded to the United States Court of Appeals for the Ninth Circuit for further proceedings consistent with the opinion of this Court." App. 97a–98a.

5. On remand, the Ninth Circuit entered a per curiam order that "[i]n accordance with the Supreme Court's opinion of February 20, 2013, as well as the resulting judgment, and taking note of the denial of a petition for rehearing on April 15, 2013, the district court's denial of Williams's habeas petition is AFFIRMED." App. 1a. There were, however, two concurring opinions. Chief Judge Kozinski explained:

> ... I'm troubled by the Supreme Court's treatment of Williams's Sixth Amendment claim. Our confidence in the correctness of a guilty verdict in a criminal case rests in large part on the fact that 12 individuals, fairly chosen, unanimously agree that the defendant is guilty. In Williams's case, there was a significant departure from this objective process. As documented by the trial transcript, the Superior Court appears to have removed a juror because he was holding out for acquittal.
>
> As several Justices noted at oral argument in the Supreme Court, such conduct by a trial judge is troubling. It cuts at the heart of our adversary system and casts doubt on the resulting verdict. If the trial judge may, during the course of deliberations, delve into the thought process of the jurors and remove those he disagrees with, our confidence in a unanimous verdict is necessarily diminished.
>
> It's not clear to me that the trial judge's actions here complied with clearly established Supreme Court precedent, but I'm not sure, as we've never ruled on the issue. It's thus surprising that the Supreme

> Court should have done so, particularly when it declined to have the question briefed, and its opinion contains no analysis supporting its conclusion.
>
> But, I have no doubt that that's precisely what the Court did in its opinion, *Johnson* v. *Williams*, 133 S. Ct. 1088, 1091–92 (2013), and it stood by that holding when it denied the petition for rehearing.
>
> I hope I'm wrong, but can see no other way to read the Court's actions. Deference to the judicial hierarchy leaves room for no other course of action on our part. But I take comfort in knowing that, if we are wrong, we can be summarily reversed.

App. 5a–6a (Kozinski, C.J., concurring); *see also* App. 2a–5a (Reinhardt, J., concurring). The panel denied Ms. Williams' petition for panel rehearing. App. 95a.

REASONS FOR GRANTING THE PETITION

I. The Mandate Rule Permitted the Ninth Circuit to Conduct a Deferential Analysis.

The concurrences below expressed that, but for the disputed 12 words and this Court's denial of rehearing, the panel would have conducted a deferential adjudication of Ms. Williams' Sixth Amendment claim. Applying established principles of the mandate rule, the Ninth Circuit could have and should have proceeded to the merits of that claim. This Court's legal analysis was expressly limited to the warden's Question 1. There was no discussion of Question 2. The denial of rehearing signified only that rehearing is disfavored, with disputes regarding the scope of the mandate to be resolved on remand.

1. This Court recently emphasized that, even if the literal language of its decision apparently terminated a claim, a court of appeals still has discretion to revive the claim on a ground not addressed by the Court, so long as the ruling on remand is not inconsistent with the Court's actual reasoning. *United States v.*

Navajo Nation, 556 U.S. 287, 296 (2009) ("*Navajo II*"). "While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939); *see Quern v. Jordan*, 440 U.S. 332, 348 n.18 (1979). The "familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid at rest ... does not tell us what issues were laid at rest." *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 140-41 (1940).

On remand from this Court, therefore, it is "critical" for a court of appeals "to determine what issues were actually decided in order to define what is the 'law' of the case. This requires a careful reading of the [Supreme Court's] opinion: observations, commentary, or mere dicta touching upon issues not formally before the Court do not constitute binding determinations." *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 533 (7th Cir. 1982) (district court erred in viewing claim as foreclosed on remand), *cert. denied*, 103 S. Ct. 1233 (1983). For example, the First Circuit — in an opinion joined by then-Circuit Judge Breyer — held that this Court's denial of a petition for rehearing, raising a question of retroactivity, could not be viewed as a ruling on the merits of that question: "[S]urely the denial of a petition for rehearing can have no greater precedential effect than the denial of a petition for certiorari, which is to say none." *Rivera Fernandez v. Chardon*, 681 F.2d 42, 51 (1st Cir.), *aff'd*, 103 S. Ct. 2611 (1982).

Because the same interpretative rules govern the mandates of the Supreme Court and of the Courts of Appeals,[1] court of appeals decisions applying the mandate rule to their own decisions are instructive. In *United States v. Cote*, 51 F.3d 178 (9th Cir. 1995), the Ninth Circuit held that the prior panel's denial of a petition for rehearing, which had sought clarification that an issue remained open on remand to the district court, did "not imply any judgment on the merits." *Id.* at 181. *Cote* expressed the court's "regret having led the district court astray by our earlier failure to use the simple words that would have obviated this problem." *Id.* at 183. *See Moore v. Anderson*, 222 F.3d 280, 284 (7th Cir. 2000) (the "summary denial of [a] petition for rehearing did not create law of the case nor did it expand the compass of our original mandate," although "[i]n retrospect ... it certainly would have been helpful for all concerned if we had briefly explained the basis for our denial of the state's petition for rehearing").

The Court's *Navajo* decisions are instructive. In *United States v. Navajo Nation*, 537 U.S. 488 (2003) ("*Navajo I*"), the Court addressed whether the Navajo Nation had stated a claim under the Indian Tucker Act, which gives the Court of Federal Claims jurisdiction where a tribe holds a substantive claim for damages against the federal government. *Id.* at 502–03. The tribe cited three statutes as a source of the substantive claim: the Indian Mineral Leasing Act of 1938, Indian Mineral Development Act of 1982, and 25 U.S.C. § 399. *Id.* at 508–09. Rejecting those arguments, this Court concluded that "we have no warrant from any relevant

---

[1] *See generally* CHARLES ALLAN WRIGHT et al., 18B FED. PRAC. & PROC. JURIS. § 4478.3 (2d ed. supp. 2013).

statute or regulation to conclude that his conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act." *Id.* at 514. On remand, the Court of Federal Claims held that *Navajo I* precluded the tribe from relying on any other statutes as a source of claims under the Indian Tucker Act. *See Navajo II*, 556 U.S. at 1554. But the Federal Circuit reversed, holding that the Navajo-Hopi Rehabilitation Act of 1950 and the Surface Mining Control and Reclamation Act of 1977 supported the tribe's Indian Tucker Act claim. *See id.*

Although this Court ultimately reversed the Federal Circuit's ruling on the merits, it agreed that *Navajo I* permitted the lower courts to reach the question. Although the literal language of *Navajo I* appeared to foreclose further review,

> our opinion (like the Court of Appeals decision we were reviewing ...) did not analyze any statutes beyond the IMLA, the IMDA, and § 399. It is thus conceivable, albeit unlikely, that some other relevant statute, though invoked by the Tribe at the outset of the litigation, might have gone unmentioned by the Federal Circuit and unanalyzed by this Court.
>
> So we cannot say that our mandate completely foreclosed the possibility that such a statute might allow for the Tribe to succeed on remand.

Navajo II, 556 U.S. at 1555. The Federal Circuit's error was in failing to apply the actual reasoning of *Navajo I* to the substance of the new-but-similar statutory arguments on remand, but it was fully justified in considering those arguments on the merits.

2. Applying ordinary principles of the mandate rule, this Court's opinion clearly should have permitted the Ninth Circuit to conduct a deferential analysis of

Ms. Williams' Sixth Amendment Claim. That question was plainly outside the compass of this Court's decision.

First, and most obviously, the Court denied certiorari on the warden's Question 2 . A party cannot even argue a point on which certiorari was denied. *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 282 (2001); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 70 n.7 (1996); *Missouri v. Jenkins*, 495 U.S. 33, 53 (1990) ("As we denied certiorari on the first question presented by the State's petition ... , we must resist the State's efforts to argue that point now.").

Second, it was with good reason that the Court denied certiorari on Question 2. The Ninth Circuit had not reached it. "This Court ... is one of final review, not of first view.'" *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009). *Cf. United States v. Apel*, 571 U.S. ___ (2014) (Alito, J., concurring) ("The Ninth Circuit did not rule on the constitutionality of [the statute under review], and I see no reason to express any view on that question at this time.").

Third, Justices Kennedy, Ginsburg, Breyer, and Sotomayor indicated at oral argument that Question 2 was troublesome but outside the scope of the Court's review. App. 105a–App. 117a.

Fourth, this Court's opinion reiterated the limited question before the Court: "We granted the warden's petition for a writ of certiorari ... in order to decide whether the Ninth Circuit erred by refusing to afford AEDPA deference to the California Court of Appeal's decision." App. 76a. Nowhere did the Court indicate that it had decided to broaden the scope of the certiorari grant to reach Question 2.

Finally, it makes no sense that, in just 12 words, the Court would summarily dispose of a claim that three justices (all of whom joined the opinion) expressly characterized as "troubling." Whether or not Ms. Williams ultimately would prevail on deferential review, the question warrants serious consideration. *See* App. 5a–6a.

3. The panel below could not see its way past this Court's summary denial of rehearing. Why did the Court not take the opportunity to clarify the scope of remand?

Navajo II already made clear that, on remand, the mandate rule could bar consideration only of the questions actually before the Court. This appeal presents a stronger case for further merits litigation on remand. *Navajo I* found "no warrant from any relevant statute or regulation to conclude that his conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act." 537 U.S. at 514. Although *Navajo I* addressed only three specific statutes, the Court's "reasoning in *Navajo I*... left no room for" a different result under the two statutes raised on remand. *Navajo II*, 556 U.S. at 1555. *See id.* at 1558 (Stevens, J., concurring) ("I agree that the precedent of [*Navajo I*] calls for the result reached here."). Still, however, it was not error for the D.C. Circuit to consider that question on the merits. *Id.* at 1555. Here, the Court's opinion contained no discussion at all of the substance of Ms. Williams' Sixth Amendment claim.

Rehearing was therefore unnecessary. The Court knew it had not reached the warden's Question 2 and that, under settled principles of the mandate rule, review of that question in the first instance was for the Ninth Circuit. Petitions for

rehearing are, of course, strongly disfavored. EUGENE GRESSMAN et al., SUPREME COURT PRACTICE 818 (9th ed. 2007). Denial of rehearing likely reflected only that this Court does not wish to encourage petitions for rehearing, except when completely necessary. This Court frequently remands cases for further proceedings, and it could open the floodgates if it permitted parties to use Rule 44.1 to pepper it with post-judgment questions regarding proceedings on remand.[2]

4. Commentators have taken note of this odd situation, where the majority of a panel has asked this Court to reverse it. *See* DANA SHILLING, L. DESK BOOK § 24.06 & n.62 (citing Scott Graham, *High Court Gives Ninth Circuit a Habeas Head-Scratcher*, THE RECORDER, July 8, 2013. Certiorari in this case is important for the bar, for lower courts, and for this Court itself.

First, consider the position of practitioners before this Court. If certiorari is denied, counsel in future cases will face a dilemma when isolated language in the Court's opinion could be read as adjudicating an issue that, by all other indications, was not at issue. Should counsel advise the client to refrain from petitioning for rehearing — a course that carries the risk of being deemed to have acquiesced? After all, in this very controversy the Court found it significant that, before the California Court of Appeal, "Williams did not seek rehearing or otherwise suggest that the court had overlooked her federal claim." App. 75a. Or should counsel advise the client to petition for rehearing—a course that carries the risk, as here, that the lower court will read significance into this Court's denial of rehearing? By granting

---

[2] Peculiar circumstances prompted Ms. Williams to petition for rehearing in this case. This Court had noted that, before the California Court of Appeal, "Williams did not seek rehearing or otherwise suggest that the court had overlooked her federal claim." App. 75a.

certiorari, this Court can clarify that Rule 44.1 petitions for rehearing are only for extraordinary situations where a party has no other remedy, and that lower courts should read nothing into the summary denial of rehearing.

Second, consider the position of lower courts. Between them, Judges Kozinski and Reinhardt have over 64 years of experience as appellate judges. Neither could explain how or why this Court would have foreclosed deferential review of Williams' claim. Everything in the proceedings — save the disputed 12 words and the denial of rehearing — told them their judicial duty was to reach the merits of Ms. Williams claim. But deference to the judicial hierarchy prevailed, even as they expressed complete bewilderment at their predicament.

Third, this Court stands to benefit from a grant of certiorari in this case. If practitioners can comfortably advise clients to forego precautionary petitions for rehearing, this Court should see fewer Rule 44.1 petitions. And if counsel can be reassured that the Court will not, in fact, unexpectedly reach issues outside a limited grant of certiorari, counsel can more comfortably submit shorter, more focused briefs in such cases.

For these reasons, Ms. Williams asks this Court to grant certiorari and to reverse. The panel decision contravened *Navajo II*, and certiorari will be of broad benefit for the appellate bench and bar.

II. This Court Never Asserted Jurisdiction Over the Warden's Question 2.

Moreover, the Court never assumed jurisdiction over Question 2. The Exceptions Clause requires this Court to adhere strictly to the statutes defining its appellate jurisdiction. Remarkably, this Court has never interpreted the "certiorari

granted" language of § 1254(1), enacted in 1948. This Court has addressed only the *prudential* implications of deciding questions on which certiorari was denied. Never has it addressed the *jurisdictional* implications of such a decision This case presents an important vehicle for this Court to do so.

1. The Exceptions Clause "enable[s] congress to regulate and restrain the appellate power, as the public interests might, from time to time, require." *Martin v. Hunter's Lessee*, 14 U.S. 304, 333 (1816) (Story, J.). Where "Congress has provided [a] rule to regulate our proceedings ... we cannot depart from it." *Wiscart v. D'Auchy*, 3 U.S. 321, 327 (1796) (Ellsworth, C.J.). The "Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress; nor can it, when conferred be exercised in any other form, or by any other mode of proceeding than that which the law prescribes." *Barry v. Mercein*, 46 U.S. 103, 119 (1847) (Taney, C.J.); *see Am. Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 378 (1893) (the Supreme Court "as it has always held, can exercise no appellate jurisdiction, except in the cases, and in the manner and form, defined and prescribed by congress"); *United States v. Young*, 94 U.S. 258, 259 (1876) (Waite, C.J.) ("we can proceed only in the manner which the law prescribes"). Congress' "affirmative description" of the Court's appellate jurisdiction "has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it." *Durousseau v. United States*, 10 U.S. 307, 314 (1810) (Marshall, C.J.).

The mode of proceeding that the law prescribes is "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case." 28 U.S.C.

§ 1254(1). The issuance of an unrestricted grant of certiorari gives this Court jurisdiction over the entire case, *Am. Constr.*, 148 U.S. at 382, including for review of plain error, *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32 (1993). But consistent with Chief Justice Marshall's opinion for the Court in *Durousseau*, a limited grant of certiorari constitutes a denial of certiorari as to other questions. *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 351 n.17 (1977). *Compare Missouri v. Jenkins*, 490 U.S. 1034 (1989) (certiorari "granted limited to Question 2"), *with Missouri v. Jenkins*, 495 U.S. at 53 ("we denied certiorari on the first question").

2. To be sure, this Court has, on a few occasions, addressed a question on which it initially denied certiorari. "An order limiting the grant of certiorari does not operate as a jurisdictional bar. We may consider questions outside the scope of the limited order when resolution of those questions is necessary for the proper disposition of the case." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 246 n.12 (1981).

Piper Aircraft cited four cases for this proposition.[3] There are three ways to view those cases, and under none of those views did this Court exercise jurisdiction over Question 2 of the warden's petition here.

---

[3] *See Redrup v. New York*, 386 U.S. 767, 769-70 (1967) (per curiam) ("The Court originally limited review in these cases to certain particularized questions .... But we have concluded that the hypothesis upon which the Court originally proceeded was invalid, and accordingly that the cases can and should be decided upon a common and controlling fundamental constitutional basis, without prejudice to the questions upon which review was originally granted."); *Propper v. Clark*, 337 U.S. 472, 476 (1949) ("This latter issue was brought forward by the petition for certiorari, Question Presented No. 3, and before argument its discussion by brief and at the bar was formally requested by this Court, although no order to that effect was entered."); *McCandless v. Furlaud*, 293 U.S. 67, 71 (1934) ("statements of counsel made at the oral argument in this Court, in answer to inquiries, and confirmed by examination of the original record, enable us to dispose of the case without passing on the specific question" on which certiorari was granted); *Olmstead v. United States*, 277 U.S. 438,

First, when this Court affirmatively declares it is reaching a question not within the scope of a limited grant of certiorari, that affirmative statement could itself be viewed as an informal grant of certiorari. The Court has not interpreted § 1254(1) to require the common law formalities of a writ of certiorari. Upon the vote to grant certiorari, the Clerk "enter[s] an order to that effect," and a "formal writ will not issue unless specially directed." U.S. Sup. Ct. R. 16.2. Here, however, the Court's opinion made no affirmative statement that it was reaching Question 2, contained no analysis of Question 2, and reiterated that the Court "granted the warden's petition for a writ of certiorari ... to decide whether the Ninth Circuit erred by refusing to afford AEDPA deference to the California Court of Appeal's decision." App. 76a.

Second, *Piper Aircraft* confined *Redrup*, *Propper*, *McCandless*, and *Olmstead* to instances "when resolution of those questions is necessary for the proper disposition of the case." 454 U.S. at 246 n.12. In that narrow circumstance, the fact that the Court granted certiorari to resolve one question can be viewed as an implied grant of the necessarily related question. Here, it cannot seriously be contended that resolution of Question 2 was necessary to the proper resolution of the antecedent Question 1.

Third, this Court could disapprove the practice of reaching questions on which it declines to grant certiorari. Three of the four decisions cited in *Piper Aircraft* — *Olmstead McCandless*, and, apparently, *Propper* — were decided under

---

466 (1928) (discussion of issues outside order limiting certiorari was "[t]o avoid any misapprehension of our views" on question that dissenting justices, "departing from that order," wished to address).

the Judges' Bill of 1925, which did not contain the "granted" language of the present statute.[4] *Piper Aircraft*, which involved an unrestricted grant in one case and a limited grant in a related case, determined that the "questions on which certiorari was granted are sufficiently broad to justify our discussion," 454 U.S. at 246 n.12, and did not address § 1254 at all. Only *Redrup* potentially contravened § 1254(1), but there was no discussion of § 1254(1) or of jurisdiction at all.[5] Rather, the majority and the dissent debated only the prudential implications of resolving the cases on grounds on which the Court denied certiorari. *Redrup*, 386 U.S. at 772 (Harlan, J., dissenting) ("these dispositions do not reflect well on the processes of the Court").

Compliance with the terms of § 1254(1) would put little burden on this Court when it chooses to address a question on which it initially denied certiorari. At any point before judgment, the Clerk could enter a Rule 16.2 order expanding the grant of certiorari. Even if that order postdated argument, the Court would have broad discretion whether to order supplemental briefing or supplemental argument. The Court could summarily decide the question based on the certiorari-stage briefing, as it frequently does in habeas cases.

---

[4] *See* 43 Stat. 936 § 240(a) (1925) ("[I]t shall be competent for the Supreme Court ...to require by certiorari ... that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."). It appears that the petition in *Clark v. Propper*, 169 F.2d 324 (2d Cir. Aug. 3, 1948), *cert. granted*, 335 U.S. 902 (Jan. 3, 1949), would not have been subject to § 1254(1), which was enacted on June 25, 1948, and became effective on September 1, 1948. *See* 62 Stat. 928 (1948).

[5] In opposing rehearing below, the warden cited Justice Ginsburg's dissent in *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 497 (1999) (Ginsburg, J., dissenting) ("The petition for certiorari asked this Court to review the merits of respondents' selective enforcement objection, but we declined to do so, granting certiorari on the jurisdictional question only .... We thus lack full briefing on respondents' selective enforcement plea and on the viability of such objections generally."). Again, however, the concerns expressed were jurisdictional, not prudential.

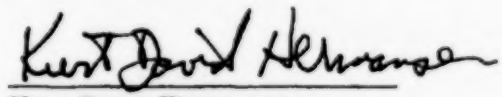
The benefits, beyond those cited in section I.4, are manifest. This Court first exercised judicial review to enforce Article III's limitations on this Court's jurisdiction. The people's "original and supreme will organizes the government, and assigns to different departments their respective powers." *Marbury v. Madison*, 5 U.S. 137, 176 (1803). Under the Exceptions Clause, it is for Congress to define the mode of this Court's exercise of its appellate jurisdiction. *Barry*, 46 U.S. at 119.

Although Congress has given this Court near-unfettered discretion in deciding which cases to take from the federal courts of appeals, this Court still must adhere to the mode specified by Congress. The Court could have asserted jurisdiction over the warden's Question 2, the fact is that it did not. Under no reading of § 1254(1) can the *denial* of certiorari on Question 2 or the *denial* of rehearing constitute a *grant* of certiorari under § 1254(1).

CONCLUSION

This Court should grant certiorari, reverse the judgment below, and remand for deferential § 2254(d) adjudication of Ms. Williams' Sixth Amendment claim.

Respectfully submitted:



KURT DAVID HERMANSEN
Counsel of Record
LAW OFFICE OF KURT HERMANSEN
550 West C Street, Suite 580
San Diego, California 92101
(619) 236–8300
kdh@kurtdavidhermansen.com

STEVEN M. KLEPPER
KRAMON & GRAHAM, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202-3201
(410) 752-6030
sklepper@kg-law.com

COUNSEL FOR PETITIONER

Dated: March 7, 2014

WAIVER

Supreme Court of the United States

No. 13-9085

Tara Sheneva Williams (Petitioner) v. Deborah K. Johnson, Acting Warden (Respondent)

I DO NOT INTEND TO FILE A RESPONSE to the petition for a writ of certiorari unless one is requested by the Court.

Please check the appropriate boxes:

☒ Please enter my appearance as Counsel of Record for all respondents.

☐ There are multiple respondents, and I do not represent all respondents. Please enter my appearance as Counsel of Record for the following respondent(s):

_____

_____

☒ I am a member of the Bar of the Supreme Court of the United States.

☐ I am not presently a member of the Bar of this Court. Should a response be requested, the response will be filed by a Bar member.

Signature [signature]

Date: 3/25/14

(Type or print) Name Stephanie Brenan

☐ Mr. ☒ Ms. ☐ Mrs. ☐ Miss

Firm Calif. Attorney General's office

Address 300 S. Spring St., Suite 1702

City & State Los Angeles, CA Zip 90013

Phone (213) 897-2056

SEND A COPY OF THIS FORM TO PETITIONER'S COUNSEL OR TO PETITIONER IF *PRO SE*. PLEASE INDICATE BELOW THE NAME(S) OF THE RECIPIENT(S) OF A COPY OF THIS FORM. NO ADDITIONAL CERTIFICATE OF SERVICE IS REQUIRED.

Cc: Kurt David Hermansen
Law Office of Kurt David Hermansen
550 West C Street, Suite 500
San Diego, CA 92101

Supreme Court, U.S.
FILED
MAR 25 2014
OFFICE OF THE CLERK

RECEIVED
MAR 27 2014
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Obtain status of case on the docket. By phone at 202-479-3034 or via the internet at http://www.supremecourtus.gov. Have the Supreme Court docket number available.

No. _____

IN THE

Supreme Court of the United States

TARA SHENEVA WILLIAMS,

Petitioner,

v.

DEBORAH K. JOHNSON, Acting Warden,

Respondent.

CERTIFICATE OF SERVICE

I, Kurt David Hermansen a member of the Bar of this Court, certify that on March 7, 2014, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid. The person so served was Stephanie C. Brenan, Deputy Attorney General, 300 South Spring Street, Suite 1702, Los Angeles, California 90013, (213) 897-2056.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 7, 2014.

KURT DAVID HERMANSEN
LAW OFFICE OF KURT HERMANSEN
550 West C Street, Suite 580
San Diego, California 92101
(619) 236-8300
kdh@kurtdavidhermansen.com

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TARA SHENEVA WILLIAMS, *Petitioner-Appellant,* v. DEBORAH K. JOHNSON, Acting Warden of the Central California Women's Facility in Chowchilla, California, *Respondent-Appellee.*	No. 07-56127 D.C. No. CV-03-02691-GW ORDER

On Remand From The United States Supreme Court

Filed July 3, 2013

Before: Alex Kozinski, Chief Judge, Stephen Reinhardt, Circuit Judge, and Ronald M. Whyte, Senior District Judge.*

Order
Concurrence by Judge Reinhardt;
Concurrence by Chief Judge Kozinski

---

* The Honorable Ronald M. Whyte, Senior U.S. District Judge for the Northern District of California, sitting by designation.

ORDER

PER CURIAM:

In accordance with the Supreme Court's opinion of February 20, 2013 as well as the resulting judgment, and taking note of the denial of a petition for rehearing on April 15, 2013, the district court's denial of Williams's habeas petition is

AFFIRMED.

REINHARDT, Circuit Judge, concurring:

I agree that we are likely required to deny Tara Williams's habeas petition. I write to provide the parties, to the extent possible, an explanation of why we hold that our authority to address this question has been foreclosed by the Supreme Court.

The Supreme Court's opinion, on its face, creates substantial uncertainty as to this court's duty on receiving the mandate on remand, and specifically whether it remains open for us to decide Williams's petition under the restrictive AEDPA standard of review—in short, to answer the question whether her conviction violated the Constitution. At the end of the introduction to the Supreme Court's opinion, it states that Williams's federal constitutional claim had been adjudicated on the merits in the state court, and therefore that the restrictive AEDPA standard of review applies to her habeas petition. It goes further, however, and states without explanation "that under that standard respondent is not

entitled to habeas relief." *Johnson v. Williams*, 133 S. Ct. 1088, 1091–92 (2013).

The last sentence of the introduction is the only mention in the entire opinion of whether or not Williams is entitled to habeas relief—that is, whether her conviction was unconstitutional. There is no discussion elsewhere as to why Williams does not merit such relief under AEDPA, and specifically whether the trial judge's actions in dismissing the lone holdout juror at Williams's trial violated the Sixth Amendment, or whether the trial judge made a clearly erroneous determination when he found that the juror was biased. But for the one sentence in the introduction, it would be fully consistent with the Court's opinion for us to address on remand the merits of Williams's claim under AEDPA's deferential standard of review, or, in other words, to determine whether she was entitled to relief under AEDPA—the question that the Court failed to discuss in the body of its opinion.

Notably, the conclusion to the Court's opinion omits any suggestion that our consideration of this question should be foreclosed. It states, "We think it exceedingly unlikely that the California Court of Appeal overlooked Williams's federal claim, and the Ninth Circuit's judgment to the contrary is reversed. The case is remanded for further proceedings consistent with this opinion." *Id.* at 1099. It is particularly difficult to reconcile the introduction and the conclusion because if, as the introduction states, Williams "is not entitled to habeas relief," then, contrary to the direction in the

conclusion, there would appear to be no "further proceedings" possible.[1]

Our duty on remand is even more unclear when the procedural context of the Court's opinion is considered. Our opinion had adjudicated Williams's petition for review under a *de novo* standard; we therefore had not considered the merits of Williams's habeas claim under the more restrictive AEDPA standard of review. The state's petition for certiorari had asked the Court to evaluate the merits, but the Court specifically declined to grant certiorari as to that question and thus limited its grant of certiorari to the question of the applicable standard of review—a fact that the Court itself noted in its opinion. *Id.* at 1094. The parties did not brief the merits of the case before the Court; specifically, they did not brief the appropriate result under the deferential AEDPA standard. Further, at oral argument, the Court deliberately declined to hear any discussion of the merits of Williams's case. When the topic arose, Justice Kennedy stated that the Court "probably shouldn't go there." Tr. of Oral Arg. at 19.[2]

Williams recognized the problem we discuss above, and asked the Court in a petition for rehearing to "clarify[] that on remand, she can continue to pursue habeas relief based on

---

[1] It is correct, however, that our judgment, relying on our holding that the state court did not decide the federal question, should, as the Court states, be reversed, in light of the Court's holding.

[2] Several justices stated that they found the trial judge's treatment of the case "very troublesome" or leaving them "deeply troubled." Tr. of Oral Arg. at 18–19, 21. I strongly share their view that the trial judge's actions abrogated a central tenet of the right to a trial by jury—the inviolate secrecy of jury deliberations—and deprived Williams of the fair trial to which she was entitled.

alternative grounds that the Ninth Circuit did not reach below, and on which th[e] Court declined to grant certiorari." In short, no party briefed, and the Court never considered, whether the trial court's error would survive the restrictive AEDPA standard of review. All the Court held was that AEDPA was the correct standard. Nevertheless, the Court refused to grant Williams's petition for rehearing, denying it without comment.

We are, of course, required to follow the mandate of the Supreme Court. We are also required to assume that the Court meant what it said in the introduction to its opinion, in which it appears to have denied Williams's habeas claim, and that it fully considered the petition for rehearing when it refused to reconsider its decision. Given the introduction to the Court's opinion, and particularly its denial of the petition for rehearing, I believe that we have no option but to conclude that the Court has deliberately precluded us from considering the merits of Williams's habeas petition under AEDPA. Accordingly, uncomfortable as I am with that result, I respectfully join my colleagues in denying Williams's petition.

Chief Judge KOZINSKI, concurring:

Like Judge Reinhardt, I'm troubled by the Supreme Court's treatment of Williams's Sixth Amendment claim. Our confidence in the correctness of a guilty verdict in a criminal case rests in large part on the fact that 12 individuals, fairly chosen, unanimously agree that the defendant is guilty. In Williams's case, there was a significant departure from this objective process. As

documented by the trial transcript, the Superior Court appears to have removed a juror because he was holding out for acquittal.

As several Justices noted at oral argument in the Supreme Court, such conduct by a trial judge is troubling. It cuts at the heart of our adversary system and casts doubt on the resulting verdict. If the trial judge may, during the course of deliberations, delve into the thought process of the jurors and remove those he disagrees with, our confidence in a unanimous verdict is necessarily diminished.

It's not clear to me that the trial judge's actions here complied with clearly established Supreme Court precedent, but I'm not sure, as we've never ruled on the issue. It's thus surprising that the Supreme Court should have done so, particularly when it declined to have the question briefed, and its opinion contains no analysis supporting its conclusion. But, I have no doubt that that's precisely what the Court did in its opinion, *Johnson* v. *Williams*, 133 S. Ct. 1088, 1091–92 (2013), and it stood by that holding when it denied the petition for rehearing.

I hope I'm wrong, but can see no other way to read the Court's actions. Deference to the judicial hierarchy leaves room for no other course of action on our part. But I take comfort in knowing that, if we are wrong, we can be summarily reversed.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TARA SHENEVA WILLIAMS,
Petitioner-Appellant,

v.

JAVIER CAVAZOS, Acting Warden of the Central California Women's Facility in Chowchilla, California,
Respondent-Appellee.

No. 07-56127
D.C. No.
CV-03-02691-GW
OPINION

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Argued and Submitted
August 2, 2010—Pasadena, California

Filed May 23, 2011

Before: Alex Kozinski, Chief Judge, Stephen Reinhardt, Circuit Judge, and Ronald M. Whyte, Senior District Judge.*

Opinion by Judge Reinhardt

*The Honorable Ronald M. Whyte, United States District Judge for the Northern District of California, sitting by designation.

COUNSEL

Kurt David Hermansen, San Diego, California, for the petitioner-appellant.

Stephanie C. Brenan, Deputy Attorney General, Los Angeles, California, for the respondent-appellee.

OPINION

REINHARDT, Circuit Judge:

Consider two scenes:

Scene One

Juror #8: I just want to talk.

Juror #7: Well, what's there to talk about? Eleven men in here think he's guilty. No one had to think twice about it except you.

Juror #10: I want to ask you something: do you believe his story?

Juror #8: I don't know whether I believe it or not — maybe I don't.

Juror #7: So how come you vote not guilty?

Juror #8: Well, there were eleven votes for guilty. It's not easy to raise my hand and send a boy off to die without talking about it first. . . . We're talking about somebody's life here. We can't decide in five minutes. Supposin' we're wrong.

Scene Two

Juror #6: I said . . . this is a very important case and we should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt. . . .

Foreman: We have spent some time now trying to understand the reasonable basis for his

> doubt, and I personally did not yet understand it . . . . I would say that two-thirds of the jurors have tried to persuade — have actively tried to persuade . . . him that his current view is incorrect. . . .
>
> Juror #4: Well, I guess he believes from the evidence that he's seen that there hasn't been sufficient proof. . . .
>
> Juror #5: I think the question may have been raised: "Do you have a political agenda?" I think [it] might have been in the heat of the argument, because it does get heated back and forth from a bunch of different people. It may have been said. . . .
>
> Juror #9: Well, he said this is a serious thing, and I don't really feel that there is enough cause for — or something to that effect. . . . What he said was, "I wouldn't want to take anyone's freedom away, unless," you know, "I was sure that certain things took place." . . . .

The first passage above is dialogue from the classic Academy Award-winning 1957 film, *Twelve Angry Men*, in which Henry Fonda plays a holdout juror who, over two tense hours, convinces his eleven peers that the defendant in a murder trial should be acquitted. The second excerpt comes from the transcript of proceedings during the petitioner's murder trial, in which each juror was examined and cross-examined, *seriatim* and mid-deliberation, after it was reported that one juror was taking a different view from the others. In the end, the trial court dismissed that juror on the ground that he was "biased"

against the prosecution. With an alternate juror in place, the jury returned a guilty verdict.

Twelve Angry Men made for great drama because it violated the sanctity of the jury's secret deliberations by allowing the audience into the jury room. It was, of course, a work of fiction. We are presented here with a similar intrusion into heated deliberations involving a holdout juror, except that this one took place in open court, and it resulted in a woman being convicted and sentenced to life imprisonment after the holdout was dismissed. Under the precedent that existed when petitioner's conviction became final (and exists today as well), the trial court's actions violated the petitioner's Sixth Amendment rights, as incorporated with respect to the states under the Fourteenth Amendment. We therefore conclude that petitioner is in custody in violation of the Constitution, reverse the judgment of the district court, and remand with instructions to grant the writ.

I. BACKGROUND

A. The Offense

One afternoon in October 1993, petitioner Tara Sheneva Williams agreed to drive around two friends, Carde Taylor and Schantel W., to case out stores for a potential robbery later that night. The third or fourth store they visited was a liquor store, which Taylor and Schantel entered while Williams waited in the car. The two emerged a few seconds later, but then Taylor went back in, pointed a gun at the proprietor and, in the course of emptying the cash register, shot and killed him. After being arrested in 1998 and initially denying knowledge of the crime, Taylor and Williams both admitted to being present and that Taylor had killed the owner. Williams told the police that, while she knew Taylor was armed, there had never been a plan to rob the store during daylight hours.

Taylor and Williams were each charged with special circumstances murder and a firearm enhancement, and they were tried separately. After a five-day jury trial, Williams was found guilty of murder with special circumstances as charged and the firearm enhancement. The jury found that a handgun was used in the commission of the crime. She was later sentenced to life imprisonment without the possibility of parole.[1]

B. The Jury Deliberations

Williams was convicted only after the trial court dismissed a known holdout juror and replaced him with an alternate. This dismissal, and the events leading up to it, form the basis of her claim for habeas relief.

Two days after the jurors began deliberations, the jury foreman delivered two notes to the trial court. The first read:

> Relative to jury instruction 17.[41].1,[2] I wish to

---

[1]Taylor was convicted as well, and sentenced to a life term without the possibility of parole, plus five years.

[2]That instruction is California's anti-jury nullification instruction, which states:

> The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on [penalty or punishment, or] any [other] improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation.

California Jury Instructions — Criminal, CALJIC No. 17.41.1 (1998 New) (6th ed. 1996) (brackets in original). The Supreme Court of California has since barred the use of this instruction, "believ[ing] [it to] ha[ve] the potential to intrude unnecessarily on the deliberative process and affect it adversely — both with respect to the freedom of jurors to express their differing views during deliberations, and the proper receptivity they should accord the views of their fellow jurors." *People v. Engelman*, 28 Cal. 4th 436, 440 (2002). The trial court's use of this instruction is not at issue here.

> inform you that we have one juror who: 1) has expressed an intention to disregard the law . . . and 2) has expressed concern relative to the severity of the charge (1st degree murder).

The second asked:

> Is it legally permissible for a juror to interpret page 32 of the jury instructions to mean that the conspiracy should involve a plan to commit a specific robbery, rather than a general plan to commit robberies in the future?

The trial court called the jury into the courtroom and informed its members that the answer to the second question was "no." All the jurors except for the foreman were asked to leave, and the court proceeded to question him regarding the first note.

1. Jury Foreman (Juror No. 8)

The foreman first confirmed that no juror had "expressed any concern about punishment or the punishment that one might expect to flow from a certain conviction," which the jury had been expressly instructed it could not do. When asked what was meant by the phrase "has expressed concern relative to the severity of the charge," the foreman answered that the juror in question "has probably ten or fifteen times in our conversations so far expressed that . . . he doesn't believe that there's sufficient evidence —." At this point, the court interrupted the foreman and informed him that he could not speak to "how jurors view the evidence" but could only express concern with whether there was "misconduct." As an example of misconduct, the court described a situation where a juror "says something like, I can't convict anybody of first degree murder because of the punishment or something like that, or I had a cousin in a similar situation, and I wouldn't want the person here to suffer what, you know, my cousin went through, something like that." The foreman then

responded: "I think it's halfway to that, and so I think that one's a little iffy, and I think your answer to the first part may be sufficient to resolve our concern at this time."

Upon the People's motion, and over Williams's objection, the court halted jury deliberations and questioned the foreman again the next day. According to the foreman, on the first day of deliberations, Juror No. 6 had brought up historical instances "when juries have refused to follow the law," such as in pre-Civil War prosecutions for harboring fugitive slaves and during the Vietnam War era for burning draft cards. The foreman expressed his opinion that Juror No. 6 had "a belief . . . that [there] is a civic responsibility to — there's a name for this — civil disobedience. There's a responsibility to be disobedient in that case." However, the foreman testified that when he had asked Juror No. 6 explicitly "if that's what was going on here," the juror answered "no."

The foreman testified that Juror No. 6 had expressed his view that first degree murder was a severe charge which affected the "way he interprets the evidence and the standard he uses for doubt." Juror No. 6, according to the foreman, had made a "fairly clear statement . . . that connects the severity of the charge with — explicitly of first degree murder with his need for a higher standard." The foreman conceded that Juror No. 6 had not explicitly expressed an unwillingness to follow the law or the jury instructions on the standard of proof. He also agreed that the juror had attempted to explain "the basis for his reasonable doubt" to the other jurors many times and had actively engaged in "intellectual conversation with them, listening to their questions, trying to answer them."

2. Juror No. 6

The court called in Juror No. 6 for questioning. Juror No. 6 testified that no juror had indicated being motivated by the issue of possible punishment in the case, and that no juror had even used the word "punishment." He denied using a higher

burden of proof based on the severity of the first degree murder charge, and stated, "I think that the same burden of proof should be used for any criminal offense, higher than a civil trial, but all criminal trials should have — whether it's first degree murder or not should have the same burden of proof." He recalled the court's instruction regarding what constituted proof beyond a reasonable doubt, and testified that he agreed to follow it as he understood it. He expressed his understanding of the instruction as: "not proof — there's always some possible doubt in any human affair, but if you have a reasonable doubt based on the evidence and only on the evidence that was presented at trial, if you have a reasonable doubt about a defendant's guilt, under the law, you are required to vote not guilty."

The prosecutor asked, "Has anyone discussed the severity of the charge?" Juror No. 6 responded, "No, not that I recall." The court then interjected, "Just to be clear, have you made reference during deliberations to the severity of the charge?" And Juror No. 6 replied, "No, I — Well, let me amend that. I said I can remember saying this is a very important case and we should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt. Other than that, I did not make a reference to the severity of the case — the severity of the charge."

The court asked Juror No. 6 about the difference between proving a criminal charge under the standard of "beyond a reasonable doubt" and proving the same charge under the standard of "very convinced beyond a reasonable doubt." Juror No. 6 began to answer "No, they're the same standards as far as —" when the court cut him off, asking, "What does 'very convinced' add?" Juror No. 6 responded, "It just means . . . it's a good idea to pay particular attention to what evidence was presented at the trial and make sure before we decide on a verdict, that we are convinced — if the verdict is guilty, that we are convinced beyond a reasonable doubt by the evidence that was presented at the trial." He then stated a

second time that "convinced beyond a reasonable doubt is the standard, and I don't think that there is a difference between convinced beyond a reasonable doubt and very convinced beyond a reasonable doubt. I think it's the same thing."

Juror No. 6 also expressed his view that "jurors should not use juror nullification." He stated, "They should base their decisions on the evidence that was presented at a particular trial and only on that evidence." Juror No. 6 was later asked again whether the jurors had discussed jury nullification. He responded that another juror had "raised the question whether juries always convict according to the law," and that he had responded, "sometimes they don't," and had shared his knowledge of historical cases in which the law "was not always enforced" and "became impossible to enforce, because juries would not convict people who were clearly in violation of it."

After Juror No. 6 was excused, the prosecutor asked the court to remove him. The court stated that it was "inclined to rule that the juror has engaged in misconduct. He's applying a higher burden of proof than the law requires . . . and . . . he isn't lying, but intentionally withheld honest information." The court noted that Juror No. 6 had "contradicted himself," because he initially answered that no juror had discussed juror nullification or the seriousness of the charge, but later admitted that he had responded to a juror's question about jurors not following the law. But the court decided to first question the other jurors about Juror No. 6, in order to develop a "fuller record."

3. The Other Ten Jurors

Over the next two hours, the trial judge, prosecutor, and defense counsel questioned each of the remaining jurors, one by one. Six jurors (Nos. 3, 5, 7, 10, 11, and 12) stated that, in their opinion, Juror No. 6 was not following the law. When questioned further, however, four of those six (Nos. 5, 7, 11,

and 12) acknowledged that Juror No. 6 had never said as much, but two (Nos. 3 and 10) reported that Juror No. 6 had said, "in essence," that he would not follow the law. The other four (Nos. 1, 2, 4, and 9) thought that Juror No. 6 was following the law, and, in the words of Juror No. 2, was "being honest." Those jurors thought there was just a difference in opinion over how the law applied to the facts of the case. Juror No. 9, for example, explained that Juror No. 6 had tried to explain his view, "but none of us really understood it the way he did." Only five jurors (Nos. 1, 2, 5, 7, and 11) mentioned jury nullification at all, of which just one (No. 2) thought Juror No. 6 might actually be engaging in the practice. Additionally, two jurors (Nos. 2 and 5) made comments to the effect that Juror No. 6 disapproved of the theory of accomplice liability. Six jurors (Nos. 2, 3, 4, 9, 10, and 11) explained that Juror No. 6 did not believe that the evidence was sufficient to prove guilt of murder beyond a reasonable doubt.

4. The Trial Court Decision

After the inquiry concluded, the court dismissed Juror No. 6 under California Penal Code section 1089, which provides for the discharge of jurors for good cause.[3] The court ruled that its dismissal of Juror No. 6 was "not because he's not deliberating and not because he's not following the law."

[3]In relevant part, the statute reads:

> If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, *or upon other good cause shown to the court is found to be unable to perform his or her duty*, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.

Cal. Penal Code § 1089 (emphasis added).

Instead, "he is dismissed without any question in my mind as a biased juror," because "his mind is bent . . . against the prosecution," as evidenced by his statements concerning the government's burden of proof, his disagreement with the felony-murder rule, and his "dishonest[y]" in recounting whether anyone had discussed the severity of the charge or juror nullification. The court then concluded that Juror No. 6 "was lying in court" and "has no business being a juror in this matter," and so dismissed him.

C. Subsequent Proceedings

An alternate juror replaced Juror No. 6 immediately. The following day, the jury returned a guilty verdict against Williams for first degree murder. Williams appealed, claiming that the trial court had both abused its discretion in applying section 1089 and violated her Sixth Amendment rights. The California Court of Appeal affirmed her conviction on the state-law ground, but did not address her Sixth Amendment claim at all. The Supreme Court of California then granted review, ordered the Court of Appeal decision vacated, and remanded the case for reconsideration in light of its recent decision, *People v. Cleveland*, 21 P.3d 1225 (Cal. 2001).

On remand, the Court of Appeal issued a slightly modified version of its prior opinion and again affirmed Williams's conviction. The Court of Appeal reiterated that the trial court "discharg[ed] Juror No. 6 because he had shown himself to be biased, *not* because he was failing to deliberate or engaging in juror nullification." Again, the court did not address her Sixth Amendment challenge. The Supreme Court of California denied Williams's second petition for review without comment, over Justice Kennard's dissent. Her conviction became final on July 9, 2002, when the time to petition the United States Supreme Court for a writ of certiorari expired.

Williams then sought relief in federal court.[4] The district court denied the petition, and Williams timely appealed.

II. STANDARD OF REVIEW

Williams filed her federal habeas petition in 2003, so it is subject to the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). Under AEDPA, federal courts may grant habeas relief to a state prisoner "with respect to any claim that was adjudicated on the merits in State court proceedings" only if that adjudication "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). To determine whether we apply "AEDPA deference" here, we must consider which state court "decision" we review, and whether that decision actually "adjudicated" Williams's Sixth Amendment claim on the merits.

A

It has long been the practice of federal habeas courts to "look through" summary denials of claims by state appellate courts and review instead the last reasoned state-court decision. *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991); *see, e.g.*, *Kennedy v. Lockyer*, 379 F.3d 1041, 1052 (9th Cir. 2004). Following the Supreme Court's decision in *Harrington v. Richter*, 131 S. Ct. 770 (2011), we continue to adhere to that practice, at least with respect to cases in which state courts of

[4]Williams's initial *pro se* petition was stayed pending exhaustion of state post-conviction remedies. Both the Court of Appeal and the Supreme Court of California denied her state habeas petitions on the ground that her claim concerning juror discharge had already been decided on direct appeal.

last resort have exercised their discretionary authority to deny petitions for review. In *Richter*, the Court held that summary denials of *original* petitions for habeas corpus filed in the Supreme Court of California should "be presumed" to be "adjudicated . . . on the merits." *Id.* at 784-785. The question in *Richter* arose because state habeas petitions in California are presented to the state supreme court as original petitions, rather than as requests for review of lower-court rulings denying relief; accordingly, the Supreme Court of California must actually adjudicate each habeas petition. Noting that "the California Supreme Court disposes of . . . more than 3,400 original habeas corpus petitioner" each year, the *Richter* Court observed that "[t]he issuance of summary dispositions in many collateral attack cases can enable a state judiciary to concentrate its resources on the cases where opinions are most needed." *Id.* at 784. It thus determined that the summary nature of the court's disposition of its thousands of original habeas petitions in no way undermines any presumption that they are decisions on the merits. *Id.* at 784-785.

A state court's decision to deny *discretionary* review is entirely different. On direct appeal of a decision by a state court of appeal in a non-capital case, the Supreme Court of California has the authority to choose whether or not to grant review. *See* Cal. R. Ct. 8.500. As when the United States Supreme Court denies a petition for certiorari, the California high court's decision to deny a petition for review is not a decision on the merits, but rather means no more than that the court has decided not to consider the case on the merits. *See, e.g., Campers v. Workers' Comp. Appeals Bd.*, 836 P.2d 888, 894 n.8 (Cal. 1992) ("[W]e reiterate the well-established rule in this state that a denial of a petition for review is not an expression of opinion of the Supreme Court on the merits of the case."); *see also People v. Davis*, 81 P. 718 (Cal. 1905) ("The significance of such refusal [by the Supreme Court to accept a case for review] is no greater than this — that this court does not consider that the interests of justice, or the purposes for which the power [to transfer cases for review] was

given, require its exercise in the particular case."). That is, under California law, the state supreme court's discretionary denial of a petition for review is decidedly not a decision on the merits. *Cf. Richter*, 131 S. Ct. at 785. Accordingly, in this case, the Supreme Court of California's denial of Williams's second petition for review — seeking review of the California Court of Appeal opinion issued on remand from the Supreme Court of California — was not a decision on the merits. We therefore continue to "look through" the state supreme court's denial of discretionary review to the last reasoned state court decision, which here is the second California Court of Appeal opinion on Williams's direct appeal.

B

We must next consider whether the Court of Appeal adjudicated Williams's Sixth Amendment claim on the merits. We conclude that it did not.

Most of the time, any claim a federal habeas court is able to consider on the merits will first have been "adjudicated on the merits in State court proceedings," and thus the strictures of § 2254(d) apply. That is so because the most common reason a claim would *not* have been adjudicated on the merits — it was never raised in state court — is itself a bar to federal habeas review. *See* 28 U.S.C. § 2254(b)(1)(A) (requiring exhaustion). Occasionally, however, a federal habeas petitioner brings a claim that *was* raised in state court but *was not* decided on its merits — because, for example, the claim was dismissed on a procedural ground that itself is inadequate to bar federal review, there was no need to address the claim in light of a precursor holding, or, as here, the court simply failed to decide the claim without explanation.[5] In such cases,

[5]That no decision on the merits was issued is, of course, no indication itself of a failure to exhaust; "[i]t is too obvious to merit extended discussion that whether the exhaustion requirement of 28 U.S.C. § 2254(b) has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court." *Smith v. Digmon*, 434 U.S. 332, 333 (1978) (per curiam).

when it is clear that the "[state] courts did not reach the merits of [the petitioner's constitutional] claim, federal habeas review is not subject to the deferential standard that applies under AEDPA to 'any claim that was adjudicated on the merits in State court proceedings' "; "[i]nstead, the claim is reviewed de novo." *Cone v. Bell*, 129 S. Ct. 1769, 1784 (2009) (quoting 28 U.S.C. § 2254(d)).[6]

[6]*See also Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (because state court never reached "prejudice" prong of ineffective assistance of counsel claim, that issue was reviewed de novo); *Wiggins v. Smith*, 539 U.S. 510, 534 (2005) (same); *Nulph v. Cook*, 333 F.3d 1052, 1056-1057 (9th Cir. 2003) (state court dismissed state habeas petition for failing to state a claim under Oregon habeas law, so "AEDPA's deferential standard . . . does not apply in this case because the state court did not reach the merits of Nulph's due process claim"); *Taylor v. Bowersox*, 329 F.3d 963, 968 (8th Cir. 2003) (de novo review because claim was not decided on the merits by the state court, which had dismissed the claim as having been previously litigated); *Pirtle v. Morgan*, 313 F.3d 1160, 1165, 1167 (9th Cir. 2002) (state court declined to adjudicate claim on state post-conviction review under its "relitigation rule," although the issue had not actually been raised on direct review, so federal habeas court reviewed claim de novo); *Norde v. Keane*, 294 F.3d 401, 410 (2d Cir. 2002) ("Here, the Appellate Division's opinion on direct review addressed only Norde's arguments that the evidence relating to the physical injury was insufficient, that the prosecutor was improperly allowed to make prejudicial remarks during summation, and that the prosecutor's inquiry into Norde's prior convictions was prejudicial. The court did not mention Norde's Sixth Amendment claims, and the opinion does not contain any language, general or specific, indicating that those claims were considered and denied on the merits. . . . Because the Appellate Division never indicated in any way that it had considered Norde's Sixth Amendment claims, we find that those claims were not adjudicated on the merits, and therefore that the AEDPA's new, more deferential standard of review does not apply." (internal citation omitted)); *Appel v. Horn*, 250 F.3d 203, 210-211 (3d Cir. 2001) (de novo review after state supreme court had wrongly "recharacterized" petitioner's constructive-denial-of-counsel claim as an ineffective-assistance-of-counsel claim, and as a result "failed to adjudicate [the] denial of counsel claim on the merits"); *Weeks v. Angelone*, 176 F.3d 249, 262-263 (4th Cir. 1999) (de novo review when state supreme court "failed to address" a properly raised claim); *Fisher v. Texas*, 169 F.3d 295, 300-302 (5th Cir. 1999) (de novo review when state court had dismissed claim on procedural grounds, not merits, and state then failed to assert the

De novo review in these infrequent circumstances is consistent with "the basic structure of federal habeas jurisdiction," which is "designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Richter*, 131 S. Ct. at 787. When those "principal forum[s]" are provided the opportunity to adjudicate constitutional challenges but fail to do so, whether intentionally or inadvertently, the only remaining forum — the federal courts — must do so in the first instance. Habeas review under such circumstances neither "frustrates . . . [the States'] good-faith attempts to honor constitutional rights" — for the State has made no attempt to do so — nor "disturbs the State's significant interest in repose for concluded litigation" — since an issue in the litigation was left unconcluded. *Id.* (internal quotation marks omitted).

This is one of those rare cases in which a claim was properly raised and yet was not decided by the state court.[7] Before

---

procedural default in federal habeas litigation); *Moore v. Parke*, 148 F.3d 705, 708-710 (7th Cir. 1998) (de novo review when state decision was based on procedural error that was not an "adequate" state ground for the decision).

[7]Counsel for the State acknowledged at oral argument that nothing in the Court of Appeal decision suggests that the court considered the Sixth Amendment argument. Audio recording of oral argument at 27:21 to 29:30:

Reinhardt, J: Where in its decision did the Court of Appeal decide the question of whether there was a Sixth Amendment violation?

Deputy A.G.: What we're looking at is they were applying what was California law. The 1089, I believe, of the Penal Code, and saying that California state court properly applied that. I think that, specifically they didn't get into a Sixth Amendment question, but if you look at, for our purposes, what we have are really no U.S. Supreme Court authority that would govern this particular type of situation . . . .

Kozinski, C.J.: That was a very long answer. . . , It wasn't a good answer; it was just a long answer. I take it the answer is

the Court of Appeal, Williams made two arguments relevant to the issue now before us. First, citing numerous state court decisions construing section 1089, she argued that the trial court abused the discretion accorded to it by that statute to dismiss jurors for cause. Pet'r Cal. Ct. App. Br. 7-8. Second, she presented her constitutional claim by arguing that the "remov[al] and replace[ment]" of a holdout juror from "a jury which had previously been deadlocked" violated her rights under the Sixth Amendment. Pet'r Cal. Ct. App. Br. 9; *see also id.* at 41-42.[8]

"no" to Judge Reinhardt's question. The Court of Appeal did not discuss the Sixth Amendment. . . . Is there anything more than "no" by way of an answer to the question Judge Reinhardt asked?

Deputy A.G.: "No" would answer it.

Kozinski, C.J.: It is not discussed. The Court of Appeal does not discuss the Sixth Amendment.

Deputy A.G.: The Court of Appeal does not discuss the Sixth Amendment. Correct.

[8] Specifically, Williams relied upon *Perez v. Marshall*, 119 F.3d 1422 (9th Cir. 1997), which recognized that the "Sixth Amendment right to a jury trial" could be offended by "the dismissal and replacement of . . . jurors" under section 1089 in some circumstances, although there was no violation on the facts of that case. Pet'r Cal. Ct. App. Br. 41-42 (citing *id.* at 1426). The substance of Williams's federal claim was just that: Because "Juror No. 6 was a holdout juror for acquittal" who "questioned the sufficiency of the People's evidence to prove appellant's guilt beyond a reasonable doubt," the court "denied [Williams] her Sixth Amendment right" by dismissing him. Pet'r Cal. Ct. App. Br. 41. Moreover, citing federal cases, Williams argued that in this case the "questioning [of all jurors] was a severe intrusion onto the secrecy of the jury's deliberations to the extent it elicited their subjective thought processes during those deliberations," which violates an "essential" constitutional feature of the "proper functioning of juries." Pet'r Cal. Ct. App. Br. 14-15 & n.12. Williams also asserted that Juror No. 6's discharge violated her right to a unanimous jury verdict. Pet'r Cal. Ct. App. Br. 9; *see also id.* at 41-42. Although there is no *federal* right to jury unanimity in state court, *see Apodaca v. Oregon*, 406 U.S. 404, 412 (1972), California does provide such a right, *see People v. Feagley*, 14 Cal. 3d 338, 350 n.10 (1975), and Williams's argument was

The Court of Appeal proceeded to adjudicate only her section 1089 claim, but not her constitutional claim. It held that the trial court did not abuse its discretion under section 1089, because sufficient evidence supported the trial court's finding that Juror No. 6 met the definition of "actual bias" under the statute. It did not consider, however, whether the removal of the known holdout juror violated the Sixth Amendment.[9]

To be sure, a state court may adjudicate the merits of a constitutional claim without citing federal precedent, and such a decision would be entitled to AEDPA deference. *See, e.g.*, *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). And under *Richter*, even "when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied," we must "presume[ ] that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." 131 S. Ct. at 784-785. Here, however, the Court of Appeal's decision was *not* "unaccompanied by an opinion explaining the reasons relief has been denied," *id.* at 784; rather the court provided a lengthy, reasoned explanation for its denial of Williams's appeal, but none of those reasons addressed her Sixth Amendment claim in any fashion, even indirectly.[10]

---

that the Sixth Amendment does not allow a juror whose vote is essential to the verdict to be removed because he is known to be in favor of the defendant, whatever the vote required to convict. In California, which requires jury unanimity, the removal of even a lone holdout juror violates that right to a fair trial by jury.

[9]In reviewing the trial court's exercise of discretion under section 1089, the court did quote a California Supreme Court case's discussion of the federal constitutional principle of impartiality. The section 1089 issue was distinct from Williams's constitutional claim: that the removal of Juror No. 6 violated her right to a fair trial by jury.

[10]In contrast, in *Murdoch v. Castro*, 609 F.3d 983 (9th Cir. 2010) (en banc), a plurality of the en banc court determined that the California Court of Appeal had "discuss[ed] and quote[d] from the section of [the petitioner's] brief in which he raised" his federal constitutional claim and had

It is obvious, not "theoretical" or "speculat[ive]," that Williams's constitutional claim was not adjudicated at all, and so the *Richter* presumption is overcome. *Id.* at 785. Specifically, the portion of the court's opinion concerning the discharge of Juror No. 6 reveals that the court upheld his dismissal on the sole basis that the trial court had not abused its discretion in applying section 1089. That the court engaged in an extended discussion of Williams's *statutory* claim, but made no mention whatsoever of her more fundamental *constitutional* claim, is a compelling "indication" that the court either overlooked or disregarded her Sixth Amendment claim entirely, rather than that it adjudicated the claim but offered no explanation at all for its decision. *Cf. id.* at 785. Put differently, when a court simply says "claims denied," and nothing more, we presume the denial is on the merits and as to all claims, *see id.* at 784-785, but when a court devotes many pages to explaining its reason for denying one claim, and then says absolutely nothing that even acknowledges the existence of a second claim, "there is reason to think" that it "is more likely" that the court simply neglected the issue and failed to adjudicate the claim.[11]

---

cited a state case that discussed the federal constitutional right. It therefore stated that the state court had adjudicated the petitioner's constitutional claim on the merits, even though it "addressed [the] argument only obliquely." *Id.* at 990 n.6 (plurality opinion). Unlike in *Murdoch*, here the state court did not address Williams's claim, obliquely or otherwise, and there is not a scintilla of evidence that the Court of Appeal decided the constitutional claim, in addition to a separate claim that it discussed at length. The *Murdoch* court found an "indication" that the state court *had* adjudicated the constitutional claim on the merits; here, the total disparity between the court's treatment in the opinion of Williams's statutory claim (reasoned in detail) and her constitutional claim (not mentioned at all) provides a strong "indication" that the claim was never adjudicated on the merits.

[11]Our "reason to think some other explanation for the state court's decision is more likely" comes in part from common sense and our own experience as sometimes-fallible judges. *Id.* When we write thorough 29-page decisions as the state court did here, yet completely fail to address a partic-

Even then, the Court of Appeal's decision might be entitled to deference if adjudicating the section 1089 claim necessarily entailed adjudicating the Sixth Amendment claim. That would be the case if, for example, California had ever defined the limit of "discretion" to discharge a juror to be at, or short of, the Sixth Amendment boundary. Were that so, a Court of Appeal finding that the trial court had not abused its discretion under section 1089 might implicitly be a determination that the Sixth Amendment had not been violated, and we might be required to consider that Williams's Sixth Amendment claim had been adjudicated on the merits. *Cf. Baker v. Blaine*, 221 F.3d 1108, 1112 (9th Cir. 2000) ("The state court decisions to which the district court gave deference either cited directly to opinions of the Supreme Court of the United States or to cases which themselves rested on Supreme Court precedent, and the state court holdings were consistent with the reasoning of the cited cases," so AEDPA deference should apply).

California does not appear to have considered, however, how the federal constitution constrains a trial court's discretion to discharge a juror from deliberations, so the *Baker* approach to recognizing indirect state determinations of federal constitutional claims does not apply.[12] *Cleveland* was not

---

ular issue, even in an oblique, tangential, or summary manner, it is most often because we so focused on the remainder of the opinion that we overlooked the issue we did not mention directly or indirectly. Just as we occasionally make mistakes and overlook an argument raised on appeal, so too do our state-court peers. It is most unlikely that the state court methodically analyzed each issue presented on appeal except one, a substantial claim of the violation of a federal constitutional right, which it chose to deny on the merits without saying a word.

[12]By contrast, California *has* considered constitutional limitations in restricting a trial court's discretion to instruct a jury once an alternate juror has been added to the group. Citing constitutional concerns, *People v. Collins*, 552 P.2d 742 (Cal. 1976), held that a trial court must direct the jury to disregard past deliberations and begin anew when an alternate juror joins. *Id.* at 745-747.

a constitutional decision; rather, the California Supreme Court defined the limits of a trial court's discretion to conduct evidentiary hearings into juror misconduct, and to dismiss jurors for good cause under section 1089, based on various "policy considerations" and its precedent interpreting section 1089.[13] 21 P.3d at 1231. In so doing, the court expressly *rejected* the juror-discharge standard adopted by the Second, Ninth, and D.C. Circuits. *See* 21 P.3d at 1236-1237 (declining to adopt, among others, *United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999), in favor of a more permissive standard). So it is entirely possible that a juror discharge under section 1089 that is permissible under *Cleveland* could nonetheless violate the Sixth Amendment. Indeed, Justice Werdegar wrote separately in *Cleveland* to raise the concern that a trial court might not abuse its discretion but nonetheless "trench upon a defendant's right to trial by jury" — a concern that the majority did not meet with any response. *Cleveland*, 21 P.3d at 1239 (Werdegar, J., concurring) (internal quotation marks omitted). The Court of Appeal's determination that the trial court did not abuse its discretion under section 1089 thus did not resolve Williams's Sixth Amendment claim, even indirectly.

Instead, we are presented with a case more like the one considered by the Third Circuit in *Hameen v. Delaware*, 212 F.3d 226 (3d Cir. 2000). The petitioner in that case alleged that the "double counting" of an aggravating circumstance in the penalty phase of his capital murder trial resulted in an Eighth Amendment violation. *Id.* at 246-247. In its opinion, the Delaware Supreme Court decided that the challenged aggravating factor did not constitute impermissible double-counting under Delaware's death penalty statute, but it did not

[13]In this respect, *Cleveland* was a California equivalent of *Brasfield v. United States*, 272 U.S. 448 (1926) or *Jenkins v. United States*, 380 U.S. 445 (1965) (per curiam), cases in which the Supreme Court set limits on district courts' interference with jury deliberations pursuant to its supervisory power, rather than the Constitution. *See Lowenfield v. Phelps*, 484 U.S. 231, 239-240 & n.2 (1988).

decide his Eighth Amendment claim, apparently believing its death penalty statute to be facially constitutional. *Ferguson v. State*, 642 A.2d 772, 781-783 (Del. 1994); *see Hameen*, 212 F.3d at 247. Reviewing that decision, the Third Circuit determined that the Delaware Supreme Court "did not pass on Ferguson's Eighth Amendment constitutional duplicative aggravating circumstances argument, even though it had the opportunity to do so." *Hameen*, 212 F.3d at 248. Accordingly, with no state decision on the merits to which to apply AEDPA deference, it reviewed de novo. *Id.* Other courts have faced similar situations. *See, e.g., Lyell v. Renico*, 470 F.3d 1177, 1182 (6th Cir. 2006); *Canaan v. McBride*, 395 F.3d 376, 382-383 (7th Cir. 2005); *Norde*, 294 F.3d at 410; *Weeks*, 176 F.3d at 262-263.

As in *Hameen*, the Court of Appeal here conducted a purely statutory analysis of whether the trial court had properly exercised its discretion under section 1089, a statute that was known to be facially constitutional. *See Miller v. Stagner*, 757 F.2d 988 (9th Cir.), *amended on other grounds*, 768 F.2d 1090 (9th Cir. 1985). But a determination that the trial court did not apply section 1089 erroneously as a matter of state law did not resolve Williams's federal claim: that section 1089 *as applied* in her case violated the Sixth Amendment, a claim that the State acknowledges the Court of Appeal did not decide. *See supra* at 6715-16 n.7. Absent a state court adjudication of that claim on the merits, we must review the claim de novo here.

C

One other potential bar to considering Williams's Sixth Amendment claim merits only brief discussion. The pre-AEDPA standards that govern this case include the Supreme Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989), which limits the constitutional claims that may be presented to a federal court sitting in habeas to exclude those "new rule[s]" that were announced after the defendant's conviction

became final, with certain exceptions. *Id.* at 301 (plurality opinion). Because "the AEDPA and *Teague* inquiries are distinct," the Supreme Court has directed that "in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state." *Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam). A *Teague* claim may be waived by the State, however, and so we need not consider *Teague* where, as here, the state does not raise it. *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). We note, in any event, that Williams does not seek retroactive application of a "new rule" of constitutional law, but rather relies upon cases that were decided years before her conviction became final in 2002, namely *United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999), and *United States v. Brown*, 823 F.2d 591 (D.C. Cir. 1987).[14] Thus, even if a *Teague* issue were properly raised, it would not affect our review.

[14]Because AEDPA's deferential standard of review does not apply, Williams is not limited to presenting violations of federal law that was "clearly established . . . as determined by the Supreme Court of the United States" at the time her conviction became final. 28 U.S.C. § 2254(d)(1). Rather, under *Teague* she may also rely upon law that had been established by the federal courts of appeals when her conviction became final. *See Bell v. Hill*, 190 F.3d 1089, 1091-1092 (9th Cir. 1999) (finding no *Teague* problem "despite the fact that Bell bases his Sixth Amendment claim specifically on Ninth Circuit precedent rather than Supreme Court precedent"); *see also Terry Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J., for the Court) ("With one caveat, whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States' under § 2254(d)(1). The one caveat, as the statutory language makes clear, is that § 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence.") (citations omitted); *id.* at 381 (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ.) ("[Section 2254(d)(1)] extends the principle of *Teague* by limiting the source of doctrine on which a federal court may rely in addressing the application for a writ.") (internal quotation marks omitted). Of course, where *Teague* is not raised the courts are free simply to apply the Constitution de novo.

III. THE MERITS

We turn, at last, to the merits of Williams's claim. Williams argues that the trial court violated her Sixth Amendment right to a fair trial by dismissing a juror who was known to be the lone holdout for acquittal. Reviewing her claim de novo, we agree, for two reasons: (1) there was a reasonable possibility that the request for the juror's discharge stemmed from his views of the merits of the case, and (2) the grounds on which the court relied did not amount to "good cause" to remove a known holdout juror, and thus violated the Sixth Amendment. Accordingly, we reverse.

A

As a general matter, the Sixth Amendment does not prohibit the mid-deliberation dismissal of jurors who are unable to serve or who engage in misconduct. In *Miller*, for example, we found no constitutional violation in the dismissal of two jurors after deliberations had begun: one of whom was sick with the flu, and another who had been intoxicated the previous morning and had fallen asleep during the rereading of testimony. 757 F.2d at 995. To the contrary, we held that the "California substitution procedure followed by the trial court" — Penal Code section 1089 — was constitutional because it "preserved the 'essential feature' of the jury required by the Sixth and Fourteenth Amendments." *Id.* (quoting *Williams v. Florida*, 399 U.S. 78, 100 (1970)). It appears that every court to have considered the question agrees that some mid-deliberation substitutions are permissible under the federal Constitution.[15]

[15] *See, e.g., Claudio v. Snyder*, 68 F.3d 1573, 1577 (3d Cir. 1995) (juror illness); *Peek v. Kemp*, 784 F.2d 1479, 1483-1484 (11th Cir. 1986) (en banc) (emotional distress and physical illness); *United States v. Hillard*, 701 F.2d 1052, 1057 (2d Cir. 1983) (illness); *United States v. Phillips*, 664 F.2d 971, 992-993 (5th Cir. Unit B 1981) (heart attack); *Henderson v. Lane*, 613 F.2d 175, 178-179 (7th Cir. 1980) (heart attack); *see also Com-*

[1] It is just as clear, however, that the Sixth Amendment does not allow a trial judge to discharge a juror on account of his views of the merits of the case. In *Duncan v. Louisiana*, 391 U.S. 145 (1968), which incorporated the Sixth Amendment with respect to the states, the Supreme Court explained,

> Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor *and against the compliant, biased, or eccentric judge*. If the defendant preferred the common-sense

---

monwealth v. Carnes, 933 N.E.2d 598, 614-615 (Mass. 2010) (upon discovering juror's material misrepresentations on juror questionnaire). Such unanimity is perhaps surprising given that this rule is in derogation of the jury practice at common law, which was "to discharge the entire panel and begin de novo by forming a new jury" when "a juror has become incapacitated by illness or death after the jury is impaneled and sworn in chief." *People v. Peete*, 202 P. 51, 65 (Cal. Ct. App. 1921); *see also West v. State*, 28 So. 430, 431 (Fla. 1900); *State v. Hasledahl*, 52 N.W. 315, 316 (N.D. 1892).

Some states, however, prohibit juror substitutions after the case has been submitted to the jury under state law. *See, e.g., Claudio v. State*, 585 A.2d 1278, 1301 (Del. 1991) (state constitution); *Crossland v. Commonwealth*, 291 S.W.3d 223, 230 (Ky. 2009) (by rule); *Hayes v. State*, 735 A.2d 1109, 1120 (Md. 1999) (by rule); *State v. Dushame*, 616 A.2d 469, 472 (N.H. 1992) (by statute); *State v. Sanchez*, 6 P.3d 486, 494 (N.M. 2000) (by rule); *People v. Ortiz*, 705 N.E.2d 1199, 1199 (N.Y. 1998) (by rule, forbidding substitutions except upon the defendant's in-court, written consent); *State v. Bobo*, 814 S.W.2d 353, 356 (Tenn. 1991) (state constitution). California, of course, is not among them. *See* Cal. Penal Code § 1089.

> judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power —a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.

Id. at 156 (emphasis added).

The Court later elaborated, "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from *that group*'s determination of guilt or innocence." *Williams*, 399 U.S. at 100 (emphasis added). The jury is the only actor permitted to determine guilt — not the judge. It is well-established, of course, that "a judge may not direct a verdict of guilty no matter how conclusive the evidence" in a criminal case. *United Bhd. of Carpenters & Joinders of Am. v. United States*, 330 U.S. 395, 408 (1947). It would similarly vitiate the "essential" role of a jury to act as a "safeguard" against both the power of the state and the court for a judge to selectively dismiss jurors based on the views of the merits of the case they express during deliberations. Such dismissals are thus prohibited as well, because a court cannot "do indirectly that which it has no power to do directly." *Sparf v. United States*, 156 U.S. 51, 106 (1895).

[2] Indeed, no one, including the judge, is even supposed to be *aware* of the views of individual jurors during deliberations, because a jury's independence is best guaranteed by secret deliberations, such that jurors may "return a verdict freely according to their conscience" and their "conduct in the jury room [may be] untrammeled by the fear of embarrassing publicity." *Clark v. United States*, 289 U.S. 1, 16 (1933). As Justice Cardozo wrote, "Freedom of debate might be stifled

and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Id.* at 13. To be sure, maintaining the secrecy of deliberations might limit a court's ability to investigate alleged misconduct. Nevertheless, as the Second Circuit has explained,

> Where the duty and authority to prevent defiant disregard of the law or evidence comes into conflict with the principle of secret jury deliberations, we are compelled to err in favor of the lesser of two evils — protecting the secrecy of jury deliberations at the expense of possibly allowing irresponsible juror activity. Achieving a more perfect system for monitoring the conduct of jurors in the intense environment of a jury deliberation room entails an unacceptable breach of the secrecy that is essential to the work of juries in the American system of justice. To open the door to the deliberation room any more widely and provide opportunities for broad-ranging judicial inquisitions into the thought processes of jurors would, in our view, destroy the jury system itself.

United States v. Thomas, 116 F.3d 606, 623 (2d Cir. 1997).

Accordingly, in deciding whether to discharge a juror mid-deliberation, the critical Sixth Amendment questions are whether, after an appropriately limited inquiry, it can be said that there is no reasonable possibility that the juror's discharge stems from his views of the merits, and whether the grounds on which the trial court relied are valid and constitutional. If the answer to either question is no, the removal of the juror violates the Sixth Amendment. We will discuss the two questions separately.

B

In cases such as *Miller* involving juror illness or intoxication, it is obvious that the basis for discharge is independent

of the juror's views of the merits. Indeed, in *Miller*, the views of the dismissed jurors were not even known. 757 F.2d at 995. Other cases have presented more uncertain circumstances. In *Perez v. Marshall*, 119 F.3d 1422 (9th Cir. 1997), a habeas petitioner claimed a violation of his Sixth Amendment rights when a known holdout juror was dismissed for good cause under section 1089. At an *in camera* hearing, the juror, a twenty-year-old woman, "told the judge that she was distressed and that she did not want the responsibility of deciding whether Perez was guilty," and requested to be dismissed. *Id.* at 1424. Over the prosecution's objection, the court denied the request and encouraged her to continue deliberating. Shortly after deliberations resumed, the foreperson reported "difficulties in the jury room," and the court suspended deliberations again. *Id.* The juror said she was not "emotionally able to continue deliberations," *id.* at 1428, and the jury foreperson confirmed that "it started to be a very emotional thing with the jurors where basically no one could try to make an intelligent decision when you're dealing with somebody that's basically in pieces," *id.* at 1425. The next morning, the court dismissed the juror on the basis that "she is just emotionally out of control." *Id.* Deferring to the "trial court's findings regarding juror fitness," we found no Sixth Amendment violation in the replacement of that juror after her repeated requests to be dismissed. *Id.* at 1426. Because "the record shows that the [trial] court was forced to act, *not* because of [the juror]'s status as a holdout juror, but because of [her] emotional inability to continue performing the essential function of a juror — deliberation," we accepted the state court's decision. *Id.* at 1427 (emphasis added); *accord id.* at 1428 ("[B]ecause there is *no evidence* to suggest that the trial court's decision was motivated by [the juror]'s views on the merits of the government's case, we affirm the . . . denial of habeas relief." (emphasis added)).

In *United States v. Brown*, 823 F.2d 591 (D.C. Cir. 1987), by contrast, the D.C. Circuit held unconstitutional the dismissal of a juror who requested to be discharged after five

weeks of deliberations. The juror told the court that "the problem" he had was "the way the R.I.C.O. conspiracy act reads. . . . If I had known at the beginning of this trial what the act said, I would have not said I could be impartial." *Id.* at 594. He acknowledged that he "disagree[d] with the law" but did not say he would refuse to follow it. Rather, he stated, "If the evidence was presented in a fashion in which the law is written, then, maybe, I would be able to discharge my duties." *Id.* Reviewing this episode, the D.C. Circuit held that "a court may not dismiss a juror during deliberations if the request for discharge stems from doubts the juror harbors about the sufficiency of the government's evidence." *Id.* at 596. "A discharge of this kind," the court explained, "would enable the government to obtain a conviction even though a member of the jury that began deliberations thought that the government had failed to prove its case. Such a result is unacceptable under the Constitution." *Id.* Recognizing that "the reasons underlying a request for a dismissal will often be unclear," and that "a court may not delve deeply into a juror's motivations because it may not intrude on the secrecy of the jury's deliberations," the court held that "if the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." *Id.* Because there was a "substantial possibility that [the juror] requested to be discharged because he believed that the evidence offered at trial was inadequate to support a conviction," the court determined that the defendant's Sixth Amendment rights had been violated. *Id.*

We adopted *Brown* in 1999, in a case involving the prosecution of Arizona Governor Fife Symington III. During deliberations, the jury sent the court two notes requesting guidance, because "[o]ne juror has stated their [*sic*] final opinion prior to review of all counts," and the jury felt "that the juror in question cannot properly participate in the discussion with us" because she was unable to maintain focus on the topics of discussion and she refused to discuss her views with the

other jurors. *Symington*, 195 F.3d at 1083. While being questioned individually, each juror confirmed the concerns raised in the notes, although "some jurors indicated that their frustration with [the juror] may have derived more from their disagreement with her on the merits of the case, or at least from their dissatisfaction with her defense of her views." *Id.* at 1084. The juror testified that she simply disagreed with the majority and she was willing to discuss the case with the other jurors, but that she had "bec[o]me intimidated" by the demands of the other jurors to justify her views. *Id.* The court dismissed the juror, on the ground that she was "either unwilling or unable to deliberate with her colleagues." *Id.*

[3] On appeal, we determined that "[w]hile there may have been some reason to doubt [the juror]'s abilities as a juror, there was also considerable evidence to suggest that the other jurors' frustrations with her derived primarily from the fact that she held a position opposite to theirs on the merits of the case." *Id.* at 1088. We therefore reversed, reasoning that "if the record evidence discloses any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." *Id.* at 1087 (emphasis omitted). We reached that conclusion because to allow dismissal under the circumstances presented would permit a court "[t]o remove a juror because he is unpersuaded by the Government's case," which would violate a defendant's rights.[10] *Id.* at 1085 (internal quotation

[10]A later AEDPA case, *Brewer v. Hall*, 378 F.3d 952 (9th Cir. 2004), which was decided long after Williams's conviction became final, characterized *Symington* as a decision under Federal Rule of Criminal Procedure 23(b), not the Sixth Amendment. Although we would not have reached the same conclusion as the Brewer court — *Symington* plainly adjudicated a Sixth Amendment challenge, *see* 195 F.3d at 1085 & n.2 — we are now bound by and therefore accept its description of *Symington*. Because we review the Sixth Amendment question presented here de novo, we may nevertheless treat *Symington* as instructive on the question of when it is constitutionally permissible to dismiss a juror mid-deliberations for reasons that could be merits-related. *Brewer* did not actually decide what the

marks omitted). We also acknowledged that a detailed inquiry into the jurors' thinking and motivations would "compromise the secrecy of jury deliberations" and "jeopardize the integrity of the deliberative process." *Id.* at 1086. We thus recognized that while a trial court's inability to resolve any ambiguity concerning alleged misconduct would result in the juror remaining empaneled, to do otherwise would, in the words of the Second Circuit, "destroy the jury system itself." *Thomas*, 116 F.3d at 623.

[4] Following *Brown*'s holding and *Symington*'s reasoning, we hold that the discharge of Juror No. 6 violated Williams's Sixth Amendment rights.[17] Even if we presume all the facts found by the state court to be correct, 28 U.S.C. § 2254(e)(1),

---

Sixth Amendment *does* require in cases of mid-deliberation juror discharge, since that case did not concern juror discharge, so the question remains open for us to answer even if *Symington* did not already answer it. *See* 378 F.3d at 955-956. Given that the D.C. Circuit's decision in *Brown*, upon which *Symington* relied and we rely, was indisputably a constitutional decision, we see no reason why the Sixth Amendment standard should be any different from the one announced in *Symington* for Rule 23. We therefore hold that, to comply with the Sixth Amendment, "if the record evidence discloses any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." *Symington*, 195 F.3d at 1087 (emphasis omitted).

[17]The Sixth Amendment protection required by *Brown* and foreshadowed by *Symington* is against improper interference with jury deliberations. Freedom to deliberate without coercion is a necessary component of "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen," which is "the essential feature of a jury." *Williams*, 399 U.S. at 100. This component of the Sixth Amendment is thus incorporated with respect to the states through the Due Process Clause of the Fourteenth Amendment. In *Weaver v. Thompson*, 197 F.3d 359 (9th Cir. 1999), for example, we held that improper coercion had broken a jury deadlock to produce the ten-to-two vote needed to convict under Oregon law, and granted habeas as a result. Similarly, the deadlock-breaking dismissal of a holdout juror on an improper basis is an unconstitutional form of interference with deliberations.

we conclude that the record discloses a "reasonable possibility that the impetus for [Juror No. 6's] dismissal stems from the juror's views on the merits of the case." 195 F.3d at 1087. At least seven jurors expressed the view that Juror No. 6 did not believe that the evidence was sufficient to prove guilt of murder beyond a reasonable doubt, thereby making a total of two-thirds of the panel. The jury foreman testified that Juror No. 6 "has probably ten or fifteen times in our conversation so far expressed that . . . he doesn't believe that there's sufficient evidence." Juror No. 2 said, "He didn't believe that whatever was in evidence was enough evidence for him." Juror No. 3 affirmed that Juror No. 6 "didn't believe that the evidence that was shown in trial was sufficient to prove the severe charge of murder." Juror No. 4 said, "Well, I guess he believes from the evidence that he's seen that there hasn't been sufficient proof." Juror No. 9 stated, "he didn't feel that there was enough proof of it [first degree murder]." Juror No. 10 said, "He didn't believe the evidence showed first degree murder should be the charge." And Juror No. 11 testified, "he said it [the evidence] wasn't proof beyond a reasonable doubt." The juror's views regarding the insufficiency of the evidence were thus made known to the prosecution as the result of a rigorous inquiry into the thought process and reasoning of Juror No. 6. Neither the trial court nor the Court of Appeal, however, even mentioned this clear evidence regarding the juror's views as to the merits, or acknowledged the strong possibility that Juror No. 6 was a holdout juror for legitimate reasons.

[5] As in *Brown*, "[g]iven the [reasonable] possibility" that the request to discharge the juror "stemmed from his belief that the evidence was inadequate to support a conviction, we must find that his dismissal violated" the defendant's Sixth Amendment right. 823 F.2d at 597. A comparison to the facts of *Symington* makes this violation all the more clear. In *Symington*, the evidence of juror misconduct was far greater than it was in the case before us, but even then we held that the juror's dismissal was improper given the "considerable evidence to suggest that the other jurors' frustrations with her

derived primarily from the fact that she held a position opposite to theirs on the merits of the case." *Symington*, 195 F.3d at 1088. The other jurors in that case were *unanimous* in their view that the discharged juror, a woman in her mid-70s, was both unable to participate in deliberations and unwilling to discuss her views. *Id.* at 1083. Here, the other jurors' views as to Juror No. 6's willingness to follow the law were mixed and the trial court ultimately did not find that he was unwilling to do so when deciding to discharge the juror; also, most of the jurors recalled Juror No. 6's many attempts to explain his views during deliberations, and *none* of the jurors expressed the view that Juror No. 6 was biased. There was, however, considerable frustration on the part of those other jurors that Juror No. 6 did not agree with them on the sufficiency of the evidence.

[6] As in *Symington*, notwithstanding the cause that the trial court believed it possessed to discharge the juror whom it knew to be the one vote for acquittal, it was not justified in *acting* upon that cause because there was a "reasonable possibility" that the request for removal was directly connected to the juror's views on the merits. Following *Brown* and *Symington*, we could reverse on this basis alone.

C

Although the reason offered above is sufficient to require granting the writ on the ground that Juror No. 6's discharge violated the Sixth Amendment, the trial court's lack of "good cause" for removing the known holdout juror provides an independent reason for reaching the same conclusion. *See Perez*, 119 F.3d at 1426. We therefore hold that, in addition to the *Symington* violation, the trial court's dismissal of Juror No. 6 was unconstitutional on its own terms.

[7] Although refusing to follow the law or refusing to deliberate would be "good cause" for discharging a juror, the trial court expressly disclaimed any finding that Juror No. 6

was guilty of either, and the Court of Appeal affirmed that determination.[18] The only good cause relied upon for dismissal of Juror No. 6 was "actual bias." The court did not find, however, that Juror No. 6 was "biased" in any traditional sense of the term, as would have been the case if, for example, he had stated that he could not be impartial or had accepted a bribe related to the case. Nor did it find that he had "implied bias," such as might have resulted from Juror No. 6 having a connection to one of the parties, or being related to someone who had either committed or been a victim of some similar crime. *Cf. Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring) (discussing possible instances of implied bias); *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998) (en banc) (holding that a juror who was a victim of multiple crimes and whose husband had been a cellmate of the defendant should have been dismissed as biased).

Rather, the court found that the juror was "biased" for five overlapping reasons: (1) "the fact that h[illegible]ded his own words to the court's instructions as to what the law is," which "indicates where his mind is bent towards and that is biased against the prosecution in the matter"; (2) "his repeating of the severity of the charge in conjunction with his bringing up the subject of juror nullification," which "establishes his state of mind that he's bent in that regard, that he's concerned about the severity of the charge, which means the severity of the punishment"; (3) when the judge "asked him what burden of proof he was relying on, he said it was a [*sic*] very, very

[18]Specifically, the trial court said, "I'm going to dismiss the juror, but not because he's not deliberating and not because he's not following the law. . . . [I]t's fairly debatable whether he was deliberating or not, so I'm not taking that into account. That is not a basis for dismissal. Not following the law is not a basis for his dismissal either, since there was a request by him to have the law clarified. It was clarified for him." Rejecting Williams's argument that the standard for good-cause dismissals set forth in *Cleveland* had been violated, the Court of Appeal explained that Juror No. 6 was discharged "because he had shown himself to be biased, *not* because he was failing to deliberate or engaging in juror nullification."

convinced beyond a reasonable doubt," which the judge believed to mean "higher than beyond a reasonable doubt because the charge is murder"; (4) the fact that "[h]e also disagrees with the felony murder rule"; and (5) the fact that "[h]e's dishonest to me in stating that no juror including himself had discussed the severity of the charge, had not discussed juror nullification."

Whether that determination amounted to "bias" under the California standard for "actual bias" is neither a question that is before us nor a ground for federal habeas relief. What we must decide instead is whether the bases for discharge relied upon by the trial judge constitute, under the circumstances of this case, "good cause" for removing a known holdout juror. We conclude that they do not, for several reasons. Absent good cause, removal of the juror violated the Sixth Amendment.

1

[8] We begin with the trial court's determination that Juror No. 6 disagreed with the felony murder rule. Such "disagreement" with the type of crime charged is not the type of bias that can justify removing a juror for good cause mid-deliberations. There is no requirement that jurors *agree* with the law that they are asked to apply, so long as they agree to apply it impartially — which Juror No. 6 did here, according to the trial court. "The defendant's entitlement to jurors impartial on the question of whether he committed the crimes charged is entirely distinct from the question of whether the crime itself is one which arouses their moral passions"; a juror need not be "impartial to the underlying crime itself." *United States v. Johnson*, 990 F.2d 1129, 1133 (9th Cir. 1993). Indeed, even in the capital-punishment context, in which jurors must be specifically *qualified* for their task, impartiality requires only that "jurors . . . follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty"; as a result, dismissing jurors who merely har-

bor doubts about the death penalty is unconstitutional. *Adams v. Texas*, 448 U.S. 38, 45, 50 (1980).

We therefore hold that any disagreement with the law expressed by Juror No. 6, even if it constituted "bias" under California law, was not "good cause" for removing a deliberating juror, absent a finding that he was unwilling to follow the law due to his concerns about it. Indeed, it would be anomalous, as well as contrary to law, to hold that a juror was "biased" by his general feelings about a law if, as the trial court found here, he was neither unwilling nor unable to follow the law as required.

2

[9] Next, certain of the other trial court findings related to Juror No. 6's "concern" with the "severity of the charge," which the trial court erroneously took to mean that the juror was applying a higher-than-allowed burden of proof. But misstating the law during a mid-deliberation voir dire that should never have taken place cannot provide good cause to dismiss a juror, and the record does not support the finding that Juror No. 6 misstated the law in any event.

Juror No. 6 testified, when questioned by the court, "I can remember saying [during the jury deliberations] this is a very important case and we should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt." That sentiment is not "good cause" for the dismissal of a deliberating juror. First, the juror's statement should never have left the jury room. The court subjected Juror No. 6 to an improper and "broad-ranging judicial inquisition[ ] into [his] thought processes." *Thomas*, 116 F.3d at 623. The court asked, for example, "*In your own personal mind*, do you believe you are using a burden of proof that is based on a charge of first degree murder that is higher than one that would be used for some charge that is less serious than first degree murder?" and then presented Juror No. 6 with a string

of questions concerning jury deliberations in other, hypothetical prosecutions for other crimes. (Emphasis added). This pervasive inquiry violated the "imperative[ ] of preserving jury secrecy." *Symington*, 195 F.3d at 1087.

Second, the court clearly misstated what Juror No. 6 had testified to during the court's inquiry. The juror did not say "very, very convinced beyond a reasonable doubt" "when [the court] asked him what burden of proof he was relying on." His words were actually: "[W]e should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt." That is, as Juror No. 6 explained when pressed by the court, "very convinced" as used in his sentence — detached from the actual standard "beyond a reasonable doubt" — simply "means it's a good . . . idea to pay particular attention to what evidence was presented at the trial and make sure before we decide on a verdict, that . . . if the verdict is guilty, that we are convinced beyond a reasonable doubt by the evidence that was presented at the trial." The trial court's misstatement of the record made its conclusion unreasonable; Juror No. 6 did not "add[ ] his own words" to create a higher burden of proof when he answered the court's question. *See Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004) (applying the more stringent AEDPA standard and explaining that "[a state court's] misapprehension [of the record] can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable").

Third, the court was wrong to derive meaning from the precise words used by the juror to define the government's burden of proof. The beyond-a-reasonable-doubt "standard is an ancient and honored aspect of our criminal justice system," but "it defies easy explication." *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). In the context of evaluating jury instructions, the Court has emphasized that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury," *Holland v. United States*, 348 U.S. 121, 140 (1954) (internal quotation marks omitted),

and that "[t]he rule may be, and often is, rendered obscure by attempts at definition, which serve to create doubts instead of removing them," *Hopt v. Utah*, 120 U.S. 430, 440-441 (1887). Similarly, the trial court's Socratic questioning of the juror regarding his understanding of the standard was unlikely to produce a clear and perfect response or reflect a precise unanimous understanding of the meaning of the words. Juror No. 6's statement was fully consistent with the jury instructions he had received. Moreover, despite the inquisition as to what standard the juror would actually apply, neither the trial court nor the Court of Appeal concluded that Juror No. 6 would not follow the law. In short, any purported deviation in Juror No. 6's understanding of those instructions did not give rise to good cause sufficient to justify removing a holdout juror.

Finally, it is hardly "bias" to acknowledge the relative "importan[ce]" of a murder trial and to "pay particular attention" to whether the evidence satisfies the required burden of proof. Rather, it is a realistic description of what all dedicated citizens who perform the public duty of serving on juries do: deliberate more intensively and consider the facts and law more thoroughly in the most serious of cases. Indeed, in *Adams* the Supreme Court expressly disapproved a *voir dire* inquiry that "exclude[d] jurors who stated that they would be 'affected' by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally." 448 U.S. at 49. So long as the jury actually applies the requisite burden of proof — which is the same for all crimes — in the end, it has acted appropriately, even if it undertook its task more deliberately and devoted more time to its deliberations before reaching its decision.

What resulted from the court's intrusive inquiry into the juror's reasoning was a suggestion that Juror No. 6 was paying "particular attention to what evidence was presented at the trial," was taking more time than others, and was not yet sure

whether the government had satisfied its burden of proof. That he was not convinced was not something that showed his bias, but rather a reflection of his current thinking regarding the issues in the case, a thought process to which the trial court should not even have been exposed.

3

[10] The remainder of the court's second determination — that Juror No. 6 was concerned with the severity of the *punishment*, as opposed to the seriousness of the *offense* charged — was contrary to the record and thus failed to amount to good cause for his dismissal. California courts, like the federal courts, prohibit juries from "discuss[ing] or consider[ing] the subject of penalty or punishment" in cases in which they have no sentencing responsibility, because the penalty that might result from a guilty verdict does not bear on the factual question of the defendant's guilt. CALJIC 17.42; *see Shannon v. United States*, 512 U.S. 573, 579 (1994). A juror's disregard for such an instruction may in some instances provide good cause to discharge him. But it is plain from the record that Juror No. 6 did not disregard the instruction here, and thus no good cause for his removal existed. *Cf. Taylor*, 366 F.3d at 1001.

According to the jury foreman, when he prepared his note to the trial court to report a juror who had "expressed concern relative to the severity of the charge," he originally wrote "severity of the punishment." He then erased "punishment" and replaced it with "charge," when "there seemed to be a consensus that that word ["punishment"] should be removed." Although the foreman "believe[d] that punishment is part of the issue in this other juror's mind," he did not say that Juror No. 6 had ever mentioned "punishment" and did not otherwise provide a basis for his belief. Indeed, only one juror, Juror No. 5, was even "pretty sure" he recalled the word "penalty" ever being used. When asked directly, none of the other jurors remembered the question of punishment or penalty

being raised. To the contrary, a number of them expressly denied that it had, distinguishing between the "charge" and the "penalty" or the "consequences," and explained that only the former had been mentioned.

Faced with this clear "consensus" among the jury and near unanimity, there could not have been good cause to dismiss Juror No. 6 for being "concerned about the severity of the charge, which means the severity of the punishment," because "they really are interchangeable." Rather, it is clear that the jurors understood the two to be distinct. As noted above, for a juror to say to his peers during deliberations that the case before them is an important one, involving serious *charges*, and that they should apply the beyond a reasonable doubt standard most carefully and deliberately, is not good cause for removal by any means.

4

[11] Finally, the trial court's determination that Juror No. 6 was "lying in court" about what had been discussed during deliberations is directly contradicted by the record. The transcript of Juror No. 6's testimony reveals that he never "stat[ed] that no juror *including himself* had discussed the severity of the charge," as the trial court found. (Emphasis added). To the contrary, when the trial judge recognized the ambiguity of the prosecutor's question, "Has anyone discussed the severity of the charge?" to which Juror No. 6 responded, "No, not that I recall," he then asked, "Just to be clear, have *you* made reference during deliberations to the severity of the charge?" (Emphasis added). Juror No. 6 then answered that, yes, *he* had talked about the importance of the case. Similarly, Juror No. 6 never "stat[ed] that no juror including himself had discussed . . . juror nullification." Again to the contrary, when asked by the prosecutor whether there was "any discussion about what the judge described as jury nullification," Juror No. 6 responded, "*Yes*, someone . . . raised the question whether juries always convict according to

the law, and I can remember I said sometimes they don't," and he then mentioned the historical examples of which he was aware. (Emphasis added).

The court's determination is contradicted not only by the record, but also by the court's earlier finding made immediately after Juror No. 6 testified. At that time, the court acknowledged that "actually, he sort of admitted that he had discussed [the severity of the charge]," and then concluded, "he *isn't* lying, but intentionally withheld honest information." (Emphasis added). Nothing in the record, however, indicated that Juror No. 6 had withheld anything, and the court offered no indication of what it thought the juror might have withheld.

We therefore conclude that the court's finding that Juror No. 6 was lying when he responded to the judicial inquiry in court was manifestly erroneous as well, and thus cannot provide good cause for his removal. In so holding, we recognize that credibility determinations fall largely within the purview of the factfinder and can rarely be reversed on direct appellate review, let alone on habeas. Nevertheless, this is not a case in which a credibility determination was based on intangible factors, such as demeanor, or on statements that are not inherently believable, or that conflict with other evidence. Rather, the trial court relied solely upon its recollection of statements made in court by the juror, which statements the juror in fact never made, as the transcript reveals. As "the state courts plainly . . . misstate[d] the record in making their findings," Williams is able to overcome the presumption of correctness bestowed upon them. *Taylor*, 366 F.3d at 1001.

D

[12] For the reasons stated above, none of the elements of the trial court's determinations, individually or collectively, regarding Juror No. 6 serve to establish the "good cause" required by the Sixth Amendment to remove a deliberating

juror, particularly one who was neither refusing to follow the law nor unwilling to deliberate. This is a separate reason, independent of the *Symington* violation, to hold that the dismissal of a known holdout juror was unconstitutional. What we are left with, then, are the conclusions (1) that *at least* a reasonable possibility existed that Juror No. 6's discharge stemmed from his disagreement with his peers over their views of the merits of the case, and (2) that there was no good cause to justify the juror's discharge.

Either conclusion standing alone would warrant reversal. Together, the constitutional violation is well beyond doubt. At most, the trial court inartfully identified some inchoate unease it felt about the juror, who was the only one not yet ready to vote to convict. Such unease, however, did not allow the court to discharge Juror No. 6, especially in light of the earlier disclosure of his views of the sufficiency of the evidence. The trial court's action deprived Williams of her constitutional right to a fair trial by jury.

IV. CONCLUSION

A hung jury is never a desirable outcome in a criminal trial. When a mistrial results, the interest shared by the State, the defendant, the court, and the public in the efficient administration of justice is diminished. The sacrifice of efficiency for the preservation of liberty is central, however, to the safeguards the Constitution affords criminal defendants. If "[m]en must turn square corners when they deal with the Government," it is even more true that the government, including the courts, may not cut corners when dealing with man's freedom. *Rock Island, Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920). Unfortunately, the trial court cut some corners here. In view of the reasonable possibility that Juror No. 6's discharge was directly or indirectly the result of his position on the merits of the case, and in view of the lack of good cause to justify his dismissal, we hold that the removal of Juror No. 6 deprived Williams of her right to a fair trial by

jury. We therefore reverse the judgment of the district court and remand with instructions to grant the writ.

REVERSED and REMANDED.

FILED
CLERK, U.S. DISTRICT COURT
MAY 30 2007
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
MAY 31 2007
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

SCANNED

Priority ✓
Send ✓
Enter ✓
Closed ✓
JS-5/JS-6 ✓
JS-2/JS-3 ___
Scan Only ___

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

TARA SHENKVA WILLIAMS,

Petitioner,

v.

GWENDOLYN MITCHELL,

Respondent.

No. CV 03-02691-GPS (VBK)

JUDGMENT

Pursuant to the Order Accepting and Adopting the Report and Recommendation of the United States Magistrate Judge, and dismissing the First Amended Petition for Writ of Habeas Corpus ("Petition") with prejudice,

IT IS ADJUDGED that the First Amended Petition is dismissed with prejudice.

DATED: 5/25/07

GEORGE P. SCHIAVELLI
UNITED STATES DISTRICT JUDGE

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

87

FILED
CLERK, U.S. DISTRICT COURT
MAY 30 2007
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
MAY 31 2007
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

SCANNED

Priority ✓
Send ✓
Enter ✓
Closed
JS-5/JS-6
JS-2/JS-3
Scan Only

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

TARA SHEVEVA WILLIAMS, Petitioner, v. GWENDOLYN MITCHELL, Respondent.	No. CV 03-02691-GPS (VBK) ORDER (1) ACCEPTING AND ADOPTING THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE, AND (2) DISMISSING THE PETITION FOR WRIT OF HABEAS CORPUS

Pursuant to 28 U.S.C. §636, the Court has made a de novo review of the First Amended Petition for Writ of Habeas Corpus ("First Amended Petition"), Respondent's Answer, Petitioner's Traverse, all of the records herein and the Report and Recommendation of the United States Magistrate Judge ("Report").

IT IS ORDERED that: (1) the Court accepts and adopts the Report and Recommendation, and (2) Judgment be entered dismissing the First Amended Petition with prejudice.

DATED: 5/28/07

GEORGE P. SCHIAVELLI
UNITED STATES DISTRICT JUDGE

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

86

DOCKETED ON CM
MAR 19 2007
BY 065

FILED
CLERK, U.S. DISTRICT COURT
MAR 19 2007
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Priority
Send
Enter
Closed
JS-5/JS-6
JS-2/JS-3
Scan Only

TARA SHENEVA WILLIAMS,

Petitioner,

v.

GWENDOLYN MITCHELL,

Defendant

CASE NUMBER

CV 03-02691-GPS (VBKx)

NOTICE OF FILING OF MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND THE LODGING OF PROPOSED ORDER

TO: All Parties of Record

You are hereby notified that pursuant to the Local Rules Governing Duties of Magistrate Judges, the Magistrate Judge's report and recommendation has been filed and a proposed judgment and/or order has been lodged on March 19, 2007 of which are attached.

Any party having objections to the report and recommendation and the proposed judgment and/or order shall, not later than ten (10) days, file and serve a written statement of objections with points and authorities in support thereof before the Honorable VICTOR B. KENTON, U.S. Magistrate Judge.

Failure to so object within the time limit specified shall be deemed a consent to any proposed findings of fact. Upon receipt of objections, or upon lapse of the time for filing objections, the case will be submitted to the District Judge for disposition. Following entry of the judgment and/or order, all motions or other matters in the case will be considered and determined by the District Judge.

The report and recommendation of a Magistrate Judge is not a final appealable order. A notice of appeal pursuant to Federal Rules of Appellate Procedure 4(a)(1) should not be filed until entry of a judgment and/or order by the District Judge.

CLERK, UNITED STATES DISTRICT COURT

Dated: March 19, 2007

By R. HORAN
Deputy Clerk

DOCKETED ON CM
MAR 19 2007
BY 065

FILED
CLERK, U.S. DISTRICT COURT
MAR 19 2007
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

SCANNED

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

TARA SHENEVA WILLIAMS, Petitioner, v. GWENDOLYN MITCHELL, Respondent.	No. CV 03-02691-GPS (VBK) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This report and recommendation is submitted to the Honorable George P. Schiavelli, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

INTRODUCTION

Tara Sheneva Williams (hereinafter referred to as "Petitioner"), a California state prisoner, filed a "Petition for Writ of Habeas Corpus by a Person in State Custody" pursuant to 28 U.S.C. §2254 on April 16, 2003. Respondent filed a motion to dismiss based upon non-exhaustion on June 13, 2003. By order issued July 24, 2003, the Court granted Petitioner's request for a stay pending exhaustion. Petitioner,

represented by counsel, filed a "First Amended Petition" on November 14, 2005, and a "Supplemental Memorandum" on January 20, 2006. Respondent filed an "Answer to First Amended Petition and Supplemental Memorandum" ("Answer") on May 17, 2006. Petitioner filed a "Traverse to Answer" ("Traverse") on September 25, 2006.

Briefing having been deemed completed, the matter is ready for decision. Having reviewed the allegations of the First Amended Petition and Supplemental Memorandum, and the matters set forth in the record and the parties' filings, it is recommended that the First Amended Petition be denied and the matter be dismissed with prejudice.

PRIOR PROCEEDINGS

Pursuant to a state jury trial, in September 1999 Petitioner was convicted of first degree murder (California Penal Code §187(a)). The jury found true allegations that the murder was committed while Petitioner "aided and abetted or was a member of a criminal conspiracy in the commission or attempted commission of the crime of robbery" (Cal. Penal Code §190.2(a)(17)), and that a principal was armed with a firearm (Cal. Penal Code §12022(a)(1)). In November 1999 the trial court sentenced Petitioner to prison for life without the possibility of parole. (Reporter's Transcript ("RT") 1366-69, 1394-95; Clerk's Transcript ("CT") 65-66, 275-77, 310-13).

Petitioner appealed to the California Court of Appeal. By order filed March 27, 2001, the Court of Appeal affirmed the judgment of the trial court. (Respondent's Lodgment no. 3, 4, 15, 16). Petitioner filed a petition for review in the California Supreme Court. By order filed July 11, 2001, the California Supreme Court granted the petition for review and remanded for reconsideration in light of People v.

Cleveland, 25 Cal.4th 466 (2001). (Respondent's Lodgment no. 5, 6). On remand the Court of Appeal requested supplemental briefing from the parties. By order filed January 13, 2002, the Court of Appeal again affirmed the judgment of the trial court. (Respondent's Lodgment no. 7, 8, 9, 10). Petitioner filed a petition for review in the California Supreme Court. By order filed April 10, 2002, the California Supreme Court denied the petition for review without comment or citation to authority. (Respondent's Lodgment no. 11, 12).

Petitioner filed a petition for writ of habeas corpus in the Los Angeles County Superior Court. By order issued June 23, 2003, the Superior Court denied the habeas petition. (Respondent's Lodgment no. 17, 18).

Petitioner filed a petition for writ of habeas corpus in the California Court of Appeal. By order issued October 14, 2003, the Court of Appeal denied the habeas petition. (Respondent's Lodgment no. 19, 20).

Petitioner filed a petition for writ of habeas corpus in the California Supreme Court. On November 10, 2004, the California Supreme Court denied the habeas petition with the following order: "Petition for writ of habeas corpus is DENIED. (See *In re Waltreus* (1965) 62 Cal.2d 218; *In re Dixon* (1953) 41 Cal.2d 756.)" (Respondent's Lodgment no. 21, 22).

FACTUAL SUMMARY

As found by the California Court of Appeal on direct review, the following facts support Petitioner's conviction:

> *Guilt phase - prosecution evidence.*
>
> . . . .
>
> On October 17, 1993, Hung Mun Kim was working alone at

his liquor store in Long Beach. Shortly before 4:00 p.m., Schantel W. entered the store and left a few seconds later. [Carde] Taylor then entered the store, followed by Schantel, and they both left a few seconds later. Taylor re-entered the store, pointed a gun at Kim and, in the course of robbing the cash register, shot him twice in the head and killed him. No arrests were made until five years later.

. . . .

When [Petitioner] was interviewed by police, in December 1998, she initially denied any knowledge of the crime. After listening to a statement Taylor had given police, [Petitioner] said she had been at the scene of the crime, but that she was not involved and didn't know anything about it. Finally, [Petitioner's] story "changed to: I was there. I went there with [Taylor] and Schantel [W.] to case the place to do a robbery. The robbery was not supposed to happen then. It was supposed to happen that night, and we were just looking to see if it was okay to rob that place."

[Petitioner] said the robbery had come about in the following way. Taylor had damaged [Petitioner's] car and agreed to pay for the repairs. Taylor asked [Petitioner] to drive her around to find a store she could rob. [Petitioner], with her infant son in the car, picked up Taylor and Schantel. She knew that Taylor had a gun with her. They checked out two or three stores, looking for one that Taylor could rob after dark. The place they checked right before the liquor store was a video store, which was no good because it closed at 5:00 p.m. [Petitioner] then drove to Kim's liquor store and parked. Taylor and Schantel got out. [Petitioner] heard two gunshots and saw Taylor and Schantel running down the street. [Petitioner] drove over to Taylor and asked what happened. Taylor was hysterical and refused to answer. [Petitioner] drove Taylor and Schantel to the house of Schantel's aunt. [Petitioner] claimed there had never been a plan to rob the store during daylight hours.

[Petitioner] and Taylor had committed a previous robbery in Culver City. In that robbery, [Petitioner] was the driver and Taylor was the robber. They had looked at 10 or 20 different stores before picking out one to rob. After the Culver City robbery, [Petitioner] and Taylor had a falling out. [Petitioner] said she broke off a sexual relationship they had been having, and Taylor was so upset she kidnapped [Petitioner's] son just to get Williams to pay attention to her. The only reason they got together for the liquor store robbery was so that Taylor could pay for the damage to [Petitioner's] car. [Petitioner] wanted Schantel present because Taylor was dangerous.

. . . .

Guilt phase - defense evidence.

. . .

[Petitioner] did not present any witnesses.

(Respondent's Lodgment no. 10 at 2-4, 6).

PETITIONER'S CONTENTIONS

Petitioner contends the following:

1. The trial court erred when it dismissed juror number six (Ground One);

2. The trial court erred when it responded to the jury's question about California Jury Instructions Criminal ("CALJIC") 6.10.5 (Ground Two).

(Amended Petition at 5, attachment at 39; Supplemental Memorandum at 2-3).

DISCUSSION

I

STANDARD OF REVIEW

This case is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See Koerner v. Grigas, 328 F.3d 1039, 1044 (9th Cir. 2003). As explained by the Supreme Court, the AEDPA "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." Williams v. Taylor, 529 U.S. 362, 412 (2000); see also Miller-El v. Cockrell, 537 U.S. 322, 337 (2003) ("Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners.").

Under the AEDPA, a federal court may not grant a writ of habeas corpus on behalf of a person in state custody "with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. §2254(d).

Section "2254(d)(1)'s 'contrary to' and 'unreasonable application' clauses have independent meaning." Bell v. Cone, 535 U.S. 685, 694 (2002). The Supreme Court has explained that

> [u]nder the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. at 412-13; Brown v. Payton, 544 U.S. 133, 140-41 (2005); Lockyer v. Andrade, 538 U.S. 63, 74-75 (2003); see Weighall v. Middle, 215 F.3d 1058, 1061 (9th Cir. 2000) (discussing Williams).

While Supreme Court precedent is the only authority that is controlling under the AEDPA, this Court may look to Ninth Circuit case law as persuasive authority "for purposes of determining whether a particular state court decision is an unreasonable application of Supreme Court law." Vlasak v. Superior Court of California ex rel. County of Los Angeles, 329 F.3d 683, 687 (9th Cir. 2003) (quoting Luna v. Cambra, 306 F.3d 954, 960 (9th Cir.) (internal quotation marks and citation omitted), amended by 311 F.3d 928 (9th Cir. 2002)).

Further, the AEDPA provides that state court findings of fact are presumed to be correct unless Petitioner rebuts that presumption by clear and convincing evidence. 28 U.S.C. §2254(e)(1).

Finally, the AEDPA "does not require a federal habeas court to

adopt any one methodology in deciding the only question that matters under §2254(d)(1) - whether a state court decision is contrary to, or involved an unreasonable application of, clearly established federal law." Lockyer v. Andrade, 538 U.S. at 71.

II

PETITIONER IS NOT ENTITLED TO HABEAS RELIEF ON HER CLAIM THAT THE TRIAL COURT ERRED BY DISMISSING JUROR NUMBER SIX

In Ground One Petitioner contends that the trial judge erred when he dismissed juror number six ("Juror 6"). Petitioner argues that it was violative of her rights under state and federal law to discharge the "lone holdout juror" during deliberations. (Amended Petition at 5, attachment at 13-50; Supplemental Memorandum at 1-2).

To the extent Petitioner raises issues of state law in Ground One, these issues must be rejected as not cognizable in federal habeas corpus proceedings. Absent some constitutional violation, a violation of state law does not provide a basis for federal habeas relief. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991).

In California, the discharge and substitution of jurors is governed by Penal Code §1089. The statute provides, in relevant part, as follows:

> If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors.

(Cal. Penal Code §1089).

The Sixth Amendment affords criminal defendants the right to trial

by an impartial jury. The right to a jury trial applies to state criminal trials through the Due Process Clause of the Fourteenth Amendment. See Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968). This Sixth Amendment right encompasses claims regarding the discharge of trial jurors. The California statute governing discharge and substitution of jurors (Penal Code §1089) has been upheld as facially constitutional. See Miller v. Stagner, 757 F.2d 988, 995 (9th Cir.), amended by 768 F.2d 1090 (9th Cir. 1985), cert. denied, 475 U.S. 1048 (1986). A habeas petitioner may raise a Sixth Amendment challenge to the trial court's discharge and substitution of a particular juror on the grounds that there was not good cause for it. See Perez v. Marshall, 119 F.3d 1422, 1426 (9th Cir. 1997), cert. denied, 522 U.S. 1096 (1998).[1] "[O]n habeas review, a trial court's findings regarding juror fitness are entitled to special deference." Id. The trial court's knowledge that the discharged juror was the sole holdout for acquittal does not in itself invalidate the decision to discharge the juror. See id. at 1427.

Here, the record reflects that approximately 1¼ days after the commencement of deliberations, the jury foreman consulted with the other jurors and sent out to the judge a written question about CALJIC 6.10.5 and a written note complaining about Juror 6's behavior. The note stated, "Relative to jury instruction 17.41.1 I wish to inform you that we have one juror who: (1) has expressed an intention to disregard the law (instruction 6.10.5, line 1 and 2) and (2) has expressed concern

---

[1] Petitioner's reliance upon United States v. Symington, 195 F.3d 1080 (9th. Cir. 1999), is misplaced. That case "based its analysis [of juror dismissal] on Federal Rule of Criminal Procedure 23(b). . . ." Brewer v. Hall, 378 F.3d 952, 957 (9th Cir.), cert. denied, 543 U.S. 1037 (2004); see also United States v. Symington, 195 F.3d at 1086 n.3.

relative to the severity of the charge (first degree murder)."[2] (CT 202, 207-09; RT 1201-02, 1239, 1244-47). The judge responded by consulting counsel, answering the jury's question about CALJIC 6.10.5, briefly questioning the jury foreman (Juror 8) about the note outside the presence of the other jurors, and then directing the jury to resume its afternoon deliberations. The following morning the prosecutor filed a motion requesting additional questioning of jury members and discharge of Juror 6 for bias. The judge held a hearing at which all twelve jurors were questioned individually outside the presence of their peers, and entertained argument from counsel. The judge concluded that Juror 6 was biased, had been dishonest during questioning in court, and should be discharged and replaced with an alternate juror. (CT 203-06, 209-11; RT 1246-52, 1257-1363). As summarized by the Court of Appeal,

> The evidentiary hearing supported the trial court's finding of bias. According to most of the jurors, Juror No. 6 had either explicitly said he would not follow the law or he had implied as much. He apparently rejected the notion that, because of vicarious liability principles, [Petitioner] and Taylor might be guilty of the same crime. The trial court was entitled to consider Juror No. 6's demeanor while being examined, and could properly come to the conclusion he had been dishonest.

(Respondent's Lodgment no. 10 at 16-17).

---

[2] As administered to the jury, CALJIC 17.41.1 provided as follows,

> The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation.

(CT 267). The first two lines of CALJIC 6.10.5 referenced by the jury's note to the judge--"A conspiracy is an agreement between two or more persons with the specific intent to agree to commit the crime of robbery"--were part of the definition of conspiracy. (CT 244).

Contrary to Petitioner's contention, the discharge of Juror 6 under the circumstances of this case did not constitute a constitutional violation. The record amply supports the trial judge's determination that good cause existed for the discharge of Juror 6. (RT 1265-1356). Habeas relief is not warranted on Ground One.

III

PETITIONER IS NOT ENTITLED TO HABEAS RELIEF ON HER CLAIM THAT THE TRIAL COURT ERRED BY RESPONDING TO THE JURY'S QUESTION

In Ground Two Petitioner contends that the trial judge erred when he responded to the written question about CALJIC 6.10.5 that the jury sent out during deliberations. Petitioner argues that the trial judge's response was inaccurate and confusing. (Supplemental Memorandum at 2-10).

Procedural Bar

Respondent contends that Ground Two is procedurally barred because the California Supreme Court denied the petition in which it was presented with the following order: "Petition for writ of habeas corpus is DENIED. (See *In re Waltreus* (1965) 62 Cal.2d 218; *In re Dixon* (1953) 41 Cal.2d 756.)" (Respondent's Lodgment no. 21, 22; Answer at 26-31). Petitioner disputes this contention. (Traverse at 12-17).

The procedural default doctrine forecloses federal review of a state prisoner's federal habeas claims if those claims were defaulted in state court pursuant to an independent and adequate state law ground. See Coleman v. Thompson, 501 U.S. 722, 729-30 (1991). To find procedural default, a federal court must determine that the state court explicitly invoked a state procedural bar as an independent basis for its decision, id. at 735, McKenna v. McDaniel, 65 F.3d 1483, 1488 (9th

Cir. 1995), and that the state procedural bar cited was clear, consistently applied, and well-established at the time of the petitioner's purported default. See Calderon v. U. S. Dist. Court for Eastern Dist. of California (Bean), 96 F.3d 1126, 1129 (9th Cir. 1996), cert. denied, 520 U.S. 1204 (1997).

The Ninth Circuit has adopted a burden-shifting analysis to determine the adequacy of a state procedural bar. Bennett v. Mueller, 322 F.3d 573, 586 (9th Cir.), cert. denied, 540 U.S. 938 (2003). Under this analysis, the state may plead, as an affirmative defense, that the petitioner's failure to satisfy a state procedural bar should foreclose federal review. Id. Once the state pleads the bar, the burden shifts to the petitioner to challenge the adequacy of that bar by showing, for example, that it has been inconsistently applied. Id. The state has the ultimate burden of proving adequacy. Id.

To preclude federal review in this circuit, a state court's order must specify which procedural rule applies to which claim. See Calderon v. U. S. Dist. Court for Eastern Dist. of California (Bean), 96 F.3d at 1131 (finding California Supreme Court order that did not specify which of 39 claims was barred by which of several state procedural rules cited was ambiguous and therefore insufficient to preclude federal review); see also Morales v. Calderon, 85 F.3d 1387, 1392 (9th Cir. 1996) ("a procedural default based on an ambiguous order that does not clearly rest on independent and adequate state grounds is not sufficient to preclude federal collateral review"); Washington v. Cambra, 208 F.3d 832 (9th Cir.) (where the state court invokes multiple rules without stating which applies to which of multiple claims, all rules must be adequate and independent), cert. denied, 531 U.S. 919 (2000).

The habeas petition which Petitioner submitted to the California

Supreme Court contained numerous claims. (Respondent's Lodgment no. 21). The California Supreme Court's order is an ambiguous order that does not specify which state procedural rule applies to which claim. Respondent acknowledges that a citation to In re Waltreus does not bar federal review. (Answer at 30). Federal habeas corpus review is not foreclosed.

Merits

To the extent Petitioner intends to raise issues of state law in Ground Two, these issues must be rejected as not cognizable in federal habeas corpus proceedings. Absent some constitutional violation, a violation of state law does not provide a basis for federal habeas relief. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991).

When a federal court reviews instructions to the jury, the question is whether the challenged instruction by itself so infected the entire trial that the trial can be deemed fundamentally unfair in violation of the petitioner's due process rights. See Estelle v. McGuire, 502 U.S. at 72-73. A due process violation can occur as a result of a judge's response to a jury's inquiry. See Beardslee v. Woodford, 358 F.3d 560, 574-75 (9th Cir.) (harmless due process violation occurred when, in responding to request for clarification, judge refused to give clarification and informed jury that no clarifying instructions could be given), cert. denied, 543 U.S. 842 (2004). A judge should respond to a jury's request for clarification with sufficient specificity to eliminate the jury's confusion. Id. An elaborate response is not a necessity; a judge responding to a jury's question may satisfy constitutional requirements by directing the jury to specific portions of the original, constitutionally adequate instructions which answer the question. Weeks v. Angelone, 528 U.S. 225, 234 (2000). Just as a jury

is presumed to follow its instructions, it is presumed to understand a judge's response to its inquiry. Id.

Petitioner was prosecuted for felony-murder under the theory that she acted as either a co-conspirator or an aider-and-abettor in the robbery during which the victim was killed. Accordingly, the jury was instructed on the principles of conspiracy and aiding and abetting. (RT 966-67, 977; CT 237-39, 244-56). The jury's question pertained to CALJIC 6.10.5, an instruction designed for use when conspiracy is not charged as an offense, but evidence of conspiracy is used at trial to prove criminal liability for acts of a co-conspirator. As administered to the jury, CALJIC 6.10.5 provided as follows:

> A conspiracy is an agreement between two or more persons with the specific intent to agree to commit the crime of robbery, and with the further specific intent to commit that crime, followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime, but is not charged as such in this case.
>
> In order to find a defendant to be a member of a conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the commission of at least one overt act. It is not necessary to such a finding as to any particular defendant that defendant personally committed the overt act, if she was one of the conspirators when the alleged overt act was committed.
>
> The term "overt act" means any step taken or act committed by one or more of the conspirators which goes beyond mere planning or agreement to commit a crime and which step or act is done in furtherance of the accomplishment of the object of the conspiracy.
>
> To be an "overt act," the step taken or act committed need not, in and of itself, constitute the crime or even an attempt to commit the crime which is the ultimate object of the conspiracy. Nor is it required that the step or act, in and of itself, be a criminal or unlawful act.

(CALJIC 6.10.5; CT 244).

The record reflects that during deliberations the jury sent out a written question on a preprinted form. Following the preprinted statement, "We, the jury in the above entitled action, request the

following," the foreman wrote, "Is it legally permissible for a juror to interpret page 32 of the jury instructions [CALJIC 6.10.5] to mean that the conspiracy should involve a plan to commit a specific robbery, rather than a general plan to commit robberies in the future?"[3] (CT 208-09; RT 1247). The judge held a hearing to discuss the matter with counsel. Defense counsel argued that the answer should be yes, while the prosecutor maintained that it should be no. The judge responded to the jury's inquiry by calling the jury and alternates into the courtroom, reading aloud the jury's question, and stating, "The answer is no." (CT 209; RT 1246-49, 1252-56). The following day Juror 6 was discharged and an alternate juror was selected to replace him. The judge instructed the reconstituted jury to begin deliberations anew. Deliberations were conducted without additional inquiries from the jury. After approximately four hours of deliberations the jury returned its verdict. (CT 209-11, 276-77; RT 1250, 1252, 1359-66).

Under California law, the crime of conspiracy is defined as two or more persons conspiring to commit any crime, together with proof of the commission of an overt act by one or more of the parties to such an agreement in furtherance thereof. People v. Vargas, 91 Cal.App.4th 506, 551 (2001); Cal. Penal Code §182. The specific intent required has two parts: "(a) the intent to agree, or conspire; and (b) the intent to commit the offense which is the object of the conspiracy." Id. (citation omitted). In other words, it must be shown "not only that the conspirators intended to agree but also that they intended to commit the elements of that offense." Id. (citation and italics omitted). It need

---

[3] This question was sent out by the jury at the same time it sent out its note complaining about the behavior of Juror 6. (CT 207-09; RT 1246-47).

not be shown that the conspirators agreed to target a particular victim. "[I]t is not necessary . . . to show that the criminal enterprise in its inception had in contemplation a particular crime as against a particular person. . . ." People v. Jordan, 24 Cal.App.2d 39, 50 (1937). For example, a defendant may be convicted of conspiracy to commit assault with a firearm even though the police stopped him and his co-conspirators before the gun was used or a target was selected. People v. Muniz, 16 Cal.App.4th 1083, 1086-88 (1993) (defendant preparing with fellow gang members for a drive-by shooting was convicted of conspiracy to commit assault with a firearm even though "[t]hey had no particular victim in mind").

Contrary to Petitioner's contention, the trial judge's response to the jury's question did not violate her constitutional right to due process. The trial judge's response correctly expressed state law and directly answered the jury's question. After receiving the trial judge's response to its inquiry the jury deliberated for several hours without posing additional questions, and then returned its verdict. "This particular jury demonstrated that it was not too shy to ask questions, suggesting that it would have asked another if it felt the judge's response unsatisfactory." Weeks v. Angelone, 528 U.S. 225, 235-36 (2000). Habeas relief is not warranted on Ground Two.

//

//

//

//

//

//

//

RECOMMENDATION

For the foregoing reasons, **IT IS RECOMMENDED** that the District Court issue an Order: (1) accepting and adopting this Report and Recommendation, and (2) directing that Judgment be entered denying and dismissing the First Amended Petition with prejudice.

DATED: 3/19/2007

VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules governing the duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 11–465

DEBORAH K. JOHNSON, ACTING WARDEN, PETITIONER *v.* TARA SHENEVA WILLIAMS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February 20, 2013]

JUSTICE ALITO delivered the opinion of the Court.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) restricts the circumstances under which a federal habeas court may grant relief to a state prisoner whose claim has already been "adjudicated on the merits in State court." 28 U. S. C. §2254(d). Specifically, if a claim has been "adjudicated on the merits in State court," a federal habeas court may not grant relief unless "the adjudication of the claim—

> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Ibid.*

Because the requirements of §2254(d) are difficult to meet, it is important whether a federal claim was "adjudicated on the merits in State court," and this case requires us to ascertain the meaning of the adjudication-on-the

merits requirement. This issue arises when a defendant convicted in state court attempts to raise a federal claim, either on direct appeal or in a collateral state proceeding, and a state court rules against the defendant and issues an opinion that addresses some issues but does not expressly address the federal claim in question. If this defendant then raises the same claim in a federal habeas proceeding, should the federal court regard the claim as having been adjudicated on the merits by the state court and apply deference under §2254(d)? Or may the federal court assume that the state court simply overlooked the federal claim and proceed to adjudicate the claim *de novo*, the course taken by the Court of Appeals in the case at hand?

We believe that the answer to this question follows logically from our decision in *Harrington* v. *Richter*, 562 U. S. ___ (2011). In that case, we held that, when a state court issues an order that summarily rejects without discussion *all* the claims raised by a defendant, including a federal claim that the defendant subsequently presses in a federal habeas proceeding, the federal habeas court must presume (subject to rebuttal) that the federal claim was adjudicated on the merits. We see no reason why this same rule should not apply when the state court addresses some of the claims raised by a defendant but not a claim that is later raised in a federal habeas proceeding.

Applying this rule in the present case, we hold that the federal claim at issue here (a Sixth Amendment jury trial claim) must be presumed to have been adjudicated on the merits by the California courts, that this presumption was not adequately rebutted, that the restrictive standard of review set out in §2254(d)(2) consequently applies, and that under that standard respondent is not entitled to habeas relief. We therefore reverse the judgment of the Court of Appeals.

I

A

In October 1993, respondent Tara Williams took two of her friends for a drive in southern California with the objective of committing a robbery. They stopped at a liquor store in Long Beach, and while Williams waited in the getaway car, her friends stole money from the cash register and fatally shot the store's owner. Williams then drove one of her friends away, and the other fled on foot. Williams avoided capture for five years but was ultimately apprehended and charged with first-degree murder.

At trial, Williams admitted that she had served as the getaway driver but claimed that she did not know that her friends were going to rob the liquor store at the particular time in question. Instead, she contended that the three friends had agreed only that they would "case" the store and would possibly return later that evening to rob it. The State countered that, regardless of whether Williams knew precisely when and where the robbery was to take place, she had agreed to help commit a robbery and that this was sufficient to provide the predicate for felony murder under California law.

After deliberating for about three hours, the jury foreman sent the judge two notes. The first note asked the following question:

> "Is it legally permissible for a juror to interpret . . . the jury instructions to mean that the conspiracy should involve a plan to commit a specific robbery rather than a general plan to commit robberies in the future?" Tr. 1247.

The second note stated:

> "I wish to inform you that we have one juror who . . . has expressed an intention to disregard the law . . . and . . . has expressed concern relative to the severity of the charge (first degree murder)." *Id.*, at 1246.

The judge told the jury that the answer to the question in the first note was "no." *Id.*, at 1249. Then, over Williams' objection, the judge briefly questioned the foreman outside the presence of the rest of the jury about the second note. The foreman said that he thought the judge's answer to the first note might resolve the problem, and the judge instructed the jury to resume its deliberations.

The next morning, once again over Williams' objection, the judge decided to inquire further about the foreman's second note. On questioning by the judge and lawyers for both parties, the foreman testified that Juror 6 had brought up past instances of jury nullification. The foreman also expressed doubt about whether Juror 6 was willing to apply the felony-murder rule. The trial judge then ordered questioning of Juror 6, who first denied and then admitted bringing up instances of nullification. Juror 6 also testified that this was a serious case and that he would vote to convict only if he was "very convinced . . . beyond a reasonable doubt." *Id.*, at 1280. He later clarified that in his view "convinced beyond a reasonable doubt" and "very convinced beyond a reasonable doubt" meant the same thing. *Id.*, at 1281. After taking testimony from the remaining jurors, who corroborated the foreman's testimony to varying degrees, the trial judge dismissed Juror 6 for bias. With an alternate juror in place, the jury convicted Williams of first-degree murder.

B

On appeal to the California Court of Appeal, Williams argued, among other things, that the discharge of Juror 6 violated both the Sixth Amendment and the California Penal Code, which allows a California trial judge to dismiss a juror who "upon . . . good cause shown to the court is found to be unable to perform his or her duty." Cal. Penal Code Ann. §1089 (West 2004). Although Williams' brief challenged the questioning and dismissal of Juror 6

on both state and federal grounds, it did not clearly distinguish between these two lines of authority.

In a written opinion affirming Williams' conviction, the California Court of Appeal devoted several pages to discussing the propriety of the trial judge's decision to dismiss the juror. *People* v. *Taylor*, No. B137365 (Mar. 27, 2001). The court held that Juror 6 had been properly dismissed for bias and quoted this Court's definition of "impartiality" in *United States* v. *Wood*, 299 U. S. 123, 145–146 (1936). But despite its extended discussion of Juror 6's dismissal and the questioning that preceded it, the California Court of Appeal never expressly acknowledged that it was deciding a Sixth Amendment issue.

Williams petitioned the California Supreme Court for review, and while her petition was pending, that court decided *People* v. *Cleveland*, 25 Cal. 4th 466, 21 P. 3d 1225 (2001), which held that a trial court had abused its discretion by dismissing for failure to deliberate a juror who appeared to disagree with the rest of the jury about the evidence. The California Supreme Court granted Williams' petition for review and remanded her case for further consideration in light of this intervening authority. *People* v. *Taylor*, No. S097387 (July 11, 2001).

On remand, the California Court of Appeal issued a revised opinion holding that the trial court had not abused its discretion by questioning the jury and dismissing Juror 6. Williams argued that Juror 6—like the holdout juror in *Cleveland*—was dismissed because he was uncooperative with other jurors who did not share his view of the evidence. But the California Court of Appeal disagreed, explaining that Williams' argument "not only misstate[d] the evidence," but also "ignore[d] the trial court's explanation that it was discharging Juror No. 6 because he had shown himself to be biased, *not* because he was failing to deliberate or engaging in juror nullification." *People* v. *Taylor*, No. B137365 (Jan. 18, 2002), App. to Pet. for Cert.

105a. As in its earlier opinion, the California Court of Appeal quoted our definition of juror bias in *Wood*, but the court did not expressly acknowledge that Williams had invoked a federal basis for her argument. Despite that omission, however, Williams did not seek rehearing or otherwise suggest that the court had overlooked her federal claim. Instead, she filed another petition for review in the California Supreme Court, but this time that court denied relief in a one-sentence order. *People* v. *Taylor*, No. S104661 (Apr. 10, 2002), App. to Pet. for Cert. 85a.

Williams sought but failed to obtain relief through state habeas proceedings, and she then filed a federal habeas petition under 28 U. S. C. §2254. The District Court applied AEDPA's deferential standard of review for claims previously adjudicated on the merits and denied relief. *Williams* v. *Mitchell*, No. 03–2691 (CD Cal., May 30, 2007), App. to Pet. for Cert. 57a. In so holding, the District Court adopted a Magistrate Judge's finding that the evidence "amply support[ed] the trial judge's determination that good cause existed for the discharge of Juror 6." *Williams* v. *Mitchell*, No. 03–2691 (CD Cal., Mar. 19, 2007), *id.*, at 70a.

The Ninth Circuit reversed. Unlike the District Court, the Ninth Circuit declined to apply the deferential standard of review contained in §2254(d). The Ninth Circuit took this approach because it thought it "obvious" that the State Court of Appeal had "overlooked or disregarded" Williams' Sixth Amendment claim.[1] *Williams* v. *Cavazos*, 646 F. 3d 626, 639 (2011). The Ninth Circuit reasoned that *Cleveland*, the State Supreme Court decision on

[1] Consistent with our decision in *Ylst* v. *Nunnemaker*, 501 U. S. 797, 806 (1991), the Ninth Circuit "look[ed] through" the California Supreme Court's summary denial of Williams' petition for review and examined the California Court of Appeal's opinion, the last reasoned state-court decision to address Juror 6's dismissal. *Williams* v. *Cavazos*, 646 F. 3d 626, 635 (2011).

which the State Court of Appeal had relied, "was not a constitutional decision," 646 F. 3d, at 640, and the Ninth Circuit attributed no significance to the state court's citation of our decision in *Wood*. Reviewing Williams' Sixth Amendment claim *de novo*, the Ninth Circuit applied its own precedent and held that the questioning and dismissal of Juror 6 violated the Sixth Amendment. 646 F. 3d, at 646–647. We granted the warden's petition for a writ of certiorari, 565 U. S. ___ (2012), in order to decide whether the Ninth Circuit erred by refusing to afford AEDPA deference to the California Court of Appeal's decision.

II

A

As noted above, AEDPA sharply limits the circumstances in which a federal court may issue a writ of habeas corpus to a state prisoner whose claim was "adjudicated on the merits in State court proceedings." 28 U. S. C. §2254(d). In *Richter*, 562 U. S., at ___ (slip op., at 10), we held that §2254(d) "does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" Rather, we explained, "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Id.*, at ___ (slip op., at 9).

Our reasoning in *Richter* points clearly to the answer to the question presented in the case at hand. Although *Richter* itself concerned a state-court order that did not address *any* of the defendant's claims, we see no reason why the *Richter* presumption should not also apply when a state-court opinion addresses some but not all of a defendant's claims. There would be a reason for drawing a distinction between these two situations if opinions issued by state appellate courts always separately addressed every

single claim that is mentioned in a defendant's papers. If there were such a uniform practice, then federal habeas courts could assume that any unaddressed federal claim was simply overlooked.

No such assumption is warranted, however, because it is not the uniform practice of busy state courts to discuss separately every single claim to which a defendant makes even a passing reference. On the contrary, there are several situations in which state courts frequently take a different course.

First, there are circumstances in which a line of state precedent is viewed as fully incorporating a related federal constitutional right. In California, for example, the state constitutional right to be present at trial "'is generally coextensive with'" the protections of the Federal Constitution. *People* v. *Butler*, 46 Cal. 4th 847, 861, 209 P. 3d 596, 606 (2009); see also, *e.g.*, *Commonwealth* v. *Prunty*, 462 Mass. 295, 305, n. 14, 968 N. E. 2d 361, 371, n. 14 (2012) (standard for racial discrimination in juror selection "'is the same under the Federal Constitution and the [Massachusetts] Declaration of Rights'"); *State* v. *Krause*, 817 N. W. 2d 136, 144 (Minn. 2012) ("'The due process protection provided under the Minnesota Constitution is identical to the due proces[s] guaranteed under the Constitution of the United States'"); *State* v. *Engelhardt*, 280 Kan. 113, 122, 119 P. 3d 1148, 1158 (2005) (observing that a Kansas statute is "analytically and functionally identical to the requirements under the Confrontation Clause and the Due Process Clause of the federal Constitution"). In this situation, a state appellate court may regard its discussion of the state precedent as sufficient to cover a claim based on the related federal right.

Second, a state court may not regard a fleeting reference to a provision of the Federal Constitution or federal precedent as sufficient to raise a separate federal claim. Federal courts of appeals refuse to take cognizance of arguments

that are made in passing without proper development. See, *e.g.*, *United States* v. *Cloud*, 680 F. 3d 396, 409, n. 7 (CA4 2012); *United States* v. *Mitchell*, 502 F. 3d 931, 953, n. 2 (CA9 2007); *United States* v. *Charles*, 469 F. 3d 402, 408 (CA5 2006); *Reynolds* v. *Wagner*, 128 F. 3d 166, 178 (CA3 1997); *Carducci* v. *Regan*, 714 F. 2d 171, 177 (CADC 1983). State appellate courts are entitled to follow the same practice.

Third, there are instances in which a state court may simply regard a claim as too insubstantial to merit discussion. Indeed, the California Court of Appeal has expresly stated that it has no obligation to address claims that lack arguable merit. See *People* v. *Rojas*, 118 Cal. App. 3d 278, 290, 173 Cal. Rptr. 91, 93 (1981). That court has explained: "In an era in which there is concern that the quality of justice is being diminished by appellate backlog with its attendant delay, which in turn contributes to a lack of finality of judgment, it behooves us as an appellate court to 'get to the heart' of cases presented and dispose of them expeditiously." *Ibid.* See also *People* v. *Burke*, 18 Cal. App. 72, 79, 122 P. 435, 439 (1912) ("The author of an opinion . . . must follow his own judgment as to the degree of elaboration to be accorded to the treatment of any proposition and *as to the questions which are worthy of notice at all*" (emphasis added)). While it is preferable for an appellate court in a criminal case to list all of the arguments that the court recognizes as having been properly presented, see R. Aldisert, Opinion Writing 95–96 (3d ed. 2012), federal courts have no authority to impose mandatory opinion-writing standards on state courts, see *Coleman* v. *Thompson*, 501 U. S. 722, 739 (1991) ("[W]e have no power to tell state courts how they must write their opinions"). The caseloads shouldered by many state appellate courts are very heavy,[2] and the opinions issued by

[2]See, *e.g.*, Judicial Council of California, 2011 Court Statistics Re-

these courts must be read with that factor in mind.

In sum, because it is by no means uncommon for a state court to fail to address separately a federal claim that the court has not simply overlooked, we see no sound reason for failing to apply the *Richter* presumption in cases like the one now before us. When a state court rejects a federal claim without expresaly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits—but that presumption can in some limited circumstances be rebutted.

B

Not satisfied with a strong but rebuttable presumption, petitioner urges us to make the presumption irrebuttable. Specifically, petitioner contends that a state court must be regarded as having adjudicated a federal claim on the merits if the state court addressed "the substance of [an] asserted trial error." Brief for Petitioner 27. Suppose, for example, that a defendant claimed in state court that something that occurred at trial violated both a provision of the Federal Constitution and a related provision of state law, and suppose further that the state court, in denying relief, made no reference to federal law. According to

---

port, Statewide Caseload Trends, 2000–2001 Through 2009–2010, p. 15 (observing that in fiscal year 2009–2010, the 105-judge California Court of Appeal produced opinions in 10,270 cases), online at http://www.courts.ca.gov/documents/2011CourtStatisticsReport.pdf (all Internet materials as visited Jan. 24, 2013, and available in Clerk of Court's case file); *In re Certification of Need for Additional Judges*, 2012 WL 6619382 (Fla., Dec. 20, 2012) (in fiscal year 2011–2012, Florida's Second District Court of Appeal received appeals in 6,834 cases); Supreme Court of Ohio, 2011 Ohio Courts Statistical Report, p. 14 (observing that in 2011 the State's 69 intermediate appellate judges rendered decisions in 7,129 cases), online at http://www.supremecourt.ohio.gov/publications/annrep/IOCS/2011OCS.pdf; Court Statistics Project, Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads 40 (2012) (noting that in 2010 state appellate courts received appeals in over 270,000 cases).

petitioner's argument, a federal habeas court would be required to proceed on the assumption that the federal claim was adjudicated on the merits.

This argument goes too far. To be sure, if the state-law rule subsumes the federal standard—that is, if it is at least as protective as the federal standard—then the federal claim may be regarded as having been adjudicated on the merits. See *Early* v. *Packer*, 537 U. S. 3, 8 (2002) (*per curiam*). But what if, for example, in at least some circumstances the state standard is *less* protective? Or what if the state standard is quite different from the federal standard, and the defendant's papers made no effort to develop the basis for the federal claim? What if a provision of the Federal Constitution or a federal precedent was simply mentioned in passing in a footnote or was buried in a string cite? In such circumstances, the presumption that the federal claim was adjudicated on the merits may be rebutted—either by the habeas petitioner (for the purpose of showing that the claim should be considered by the federal court *de novo*) or by the State (for the purpose of showing that the federal claim should be regarded as procedurally defaulted). See *Coleman*, *supra*, at 739 (rebuttable presumption of no independent and adequate state ground applies so long as "it fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law"). Thus, while the *Richter* presumption is a strong one that may be rebutted only in unusual circumstances, it is not irrebuttable.[3] "*Per se* rules should not be applied . . . in situations where the generalization is incorrect as an empirical matter," *Coleman*, 501 U. S., at 737, and an irrebuttable presumption

---

[3] For example, when a defendant does so little to raise his claim that he fails to "'fairly present'" it in "each appropriate state court," *Baldwin* v. *Reese*, 541 U. S. 27, 29 (2004), the *Richter* presumption is fully rebutted.

that state courts never overlook federal claims would occasionally miss the mark.

The language of 28 U. S. C. §2254(d) makes it clear that this provision applies only when a federal claim was "adjudicated *on the merits* in State court." A judgment is normally said to have been rendered "on the merits" only if it was "delivered after the court . . . heard and *evaluated* the evidence and the parties' substantive arguments." Black's Law Dictionary 1199 (9th ed. 2009) (emphasis added). And as used in this context, the word "merits" is defined as "*[t]he intrinsic rights and wrongs of a case* as determined by *matters of substance*, in distinction from matters of form." Webster's New International Dictionary 1540 (2d ed. 1954) (emphasis added); see also, *e.g.*, 9 Oxford English Dictionary 634 (2d ed. 1989) ("*the intrinsic 'rights and wrongs' of the matter*, in contradistinction to extraneous points such as the competence of the tribunal or the like" (emphasis added)); Random House Dictionary of the English Language 897 (1967) ("the *intrinsic right and wrong of a matter*, as a law case, unobscured by procedural details, technicalities, personal feelings, etc." (emphasis added)). If a federal claim is rejected as a result of sheer inadvertence, it has not been evaluated based on the intrinsic right and wrong of the matter. JUSTICE SCALIA is surely correct that such claims have been adjudicated and present federal questions we may review, *post*, at 3–4, but it does not follow that they have been adjudicated "on the merits." By having us nevertheless apply AEDPA's deferential standard of review in such cases, petitioner's argument would improperly excise §2254(d)'s on-the-merits requirement.

Nor does petitioner's preferred approach follow inexorably from AEDPA's deferential architecture. Even while leaving "primary responsibility" for adjudicating federal claims to the States, *Woodford* v. *Visciotti*, 537 U. S. 19, 27 (2002) (*per curiam*), AEDPA permits *de novo* review in

those rare cases when a state court decides a federal claim in a way that is "contrary to" clearly established Supreme Court precedent, see *Panetti* v. *Quarterman*, 551 U. S. 930, 953 (2007). When the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court, §2254(d) entitles the prisoner to an unencumbered opportunity to make his case before a federal judge.

We are not persuaded that applying a rebuttable presumption in this context will be unduly burdensome for federal courts. Before *Richter*, every Court of Appeals to consider the issue allowed a prisoner to argue that a state court had overlooked his federal claim.[4] That approach did not prompt an unmanageable flood of litigation, and we see no reason to fear that it will do so now.

III

Applying the presumption of merits adjudication to the facts of this case, we hold that the Ninth Circuit erred by finding that the California Court of Appeal overlooked Williams' Sixth Amendment claim. Several facts make this conclusion inescapable.

Most important is the state court's discussion of *Cleveland*, 25 Cal. 4th 466, 21 P. 3d 1225, a California Supreme Court decision on which the Court of Appeal solicited briefing. *Cleveland* held that a California trial court, "if put on notice that a juror is not participating in deliberations," may "conduct 'whatever inquiry is reasonably necessary to determine' whether such grounds exist and

---

[4]See, *e.g.*, *Lovell* v. *Renico*, 470 F. 3d 1177, 1181–1182 (CA6 2006); *Billings* v. *Polk*, 441 F. 3d 238, 252 (CA4 2006); *Espy* v. *Massac*, 443 F. 3d 1362, 1364–1365, and n. 2 (CA11 2006); *Brown* v. *Luebbers*, 371 F. 3d 458, 460–461 (CA8 2004) (en banc); *Chadwick* v. *Janecka*, 312 F. 3d 597, 606 (CA3 2002); *Norde* v. *Keane*, 294 F. 3d 401, 410 (CA2 2002); *Duckett* v. *Mullin*, 306 F. 3d 982, 990 (CA10 2002); *Fortini* v. *Murphy*, 257 F. 3d 39, 47 (CA1 2001).

. . . discharge the juror if it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate." *Id.*, at 484, 21 P. 3d, at 1237 (citations omitted). The *Cleveland* court acknowledged "[t]he need to protect the sanctity of jury deliberations," *id.*, at 476, 21 P. 3d, at 1231, and included a lengthy discussion of three Federal Court of Appeals cases that it said had "considered these issues in depth," *id.*, at 480–484, 21 P. 3d, at 1234–1237. Those three cases—*United States* v. *Symington*, 195 F. 3d 1080 (CA9 1999), *United States* v. *Thomas*, 116 F. 3d 606 (CA2 1997), and *United States* v. *Brown*, 823 F. 2d 591 (CADC 1987)—concern the discharge of holdout jurors in federal court. Each case discusses the Sixth Amendment right to a jury trial and concludes that a trial court should not inquire further if it appears that there is "'any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case.'" *Cleveland*, *supra*, at 484, 21 P. 3d, at 1237 (quoting *Symington*, *supra*, at 1087); see also *Thomas*, *supra*, at 621–622; *Brown*, *supra*, at 596. Though the *Cleveland* court found much to praise in these decisions, it expressly declined to follow them on this point. 25 Cal. 4th, at 483–484, 21 P. 3d, at 1236–1237.

Cleveland did not expressly purport to decide a federal constitutional question, but its discussion of *Symington*, *Thomas*, and *Brown* shows that the California Supreme Court understood itself to be deciding a question with federal constitutional dimensions. See 25 Cal. 4th, at 487, 21 P. 3d, at 1239 (Werdegar, J., concurring) (emphasizing importance of careful appellate review in juror discharge cases in light of the "constitutional dimension to the problem"). Indeed, it is difficult to imagine the California Supreme Court announcing an interpretation of Cal. Penal Code Ann. §1089 that it believed to be less protective than the Sixth Amendment, as any such interpretation would provide no guidance to state trial judges bound to follow

both state and federal law.

The Ninth Circuit's conclusion to the contrary rested on the fact that *Cleveland* refused to follow *Symington*, *Brown*, and *Thomas*. 646 F. 3d, at 640. But the views of the federal courts of appeals do not bind the California Supreme Court when it decides a federal constitutional question, and disagreeing with the lower federal courts is not the same as ignoring federal law. The Ninth Circuit's apparent assumption that the California Supreme Court could not refuse to follow federal court of appeals precedent without disregarding the Federal Constitution would undo §2254(d)'s "contrary to" provision, which requires deference unless a state court fails to follow *Supreme Court* precedent. 28 U. S. C. §2254(d)(1).

Regardless of whether a California court would consider Williams' §1089 and Sixth Amendment claims to be perfectly coextensive, the fact that these claims are so similar makes it unlikely that the California Court of Appeal decided one while overlooking the other. Indeed, it is difficult to imagine any panel of appellate judges reading *Cleveland* and passing on the propriety of dismissing a holdout juror under §1089 without realizing that such situations also bear on the federal constitutional right to a fair trial. The California Court of Appeal's quotation of our definition of "impartiality" from *Wood*, 299 U. S., at 145–146, points to the same conclusion, confirming that the state court was well aware that the questioning and dismissal of Juror 6 implicated both state and federal law.

Williams' litigation strategy supports the same result. Throughout her state proceedings, Williams treated her state and federal claims as interchangeable, and it is hardly surprising that the state courts did so as well. See Brief for Appellant in No. B137365 (Cal. App.), App. 29 (citing §1089 precedent and concluding that Williams "was accordingly denied her Sixth Amendment right to a unanimous jury"). After the California Court of Appeal ren-

dered its decision, Williams neither petitioned that court for rehearing nor argued in the subsequent state and federal proceedings that the state court had failed to adjudicate her Sixth Amendment claim on the merits. The possibility that the California Court of Appeal had simply overlooked Williams' Sixth Amendment claim apparently did not occur to anyone until that issue was raised by two judges during the oral argument in the Ninth Circuit. See 646 F. 3d, at 638, n. 7. Williams presumably knows her case better than anyone else, and the fact that she does not appear to have thought that there was an oversight makes such a mistake most improbable.

We think it exceedingly unlikely that the California Court of Appeal overlooked Williams' federal claim, and the Ninth Circuit's judgment to the contrary is reversed. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 11–465

DEBORAH K. JOHNSON, ACTING WARDEN, PETITIONER *v.* TARA SHENEVA WILLIAMS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February 20, 2013]

JUSTICE SCALIA, concurring in the judgment.

I agree with the Court's rejection of the proposition that a judgment denying a federal claim is irrebuttably presumed to have been "adjudicated on the merits" within the meaning of 28 U. S. C. §2254(d). I disagree, however, that one of the grounds on which the rebuttal may rely is that the federal claim was "inadvertently overlooked." *Ante*, at 13. In my view the rebuttal must consist of a showing, based on the explicit text of the court's order, or upon standard practice and understanding in the jurisdiction with regard to the meaning of an ambiguous text, that the judgment *did not purport* to decide the federal question. "Decided after due consideration" is not, and has never been, the meaning of the legal term of art "decided on the merits," and giving it that meaning burdens our lower courts with an unusual subjective inquiry that demeans state courts and will be a fertile source of litigation and delay.

In the Court's view, a habeas petitioner receives *de novo* review if he can prove that the state court, although addressing his state claim, overlooked his federal claim. A nonexhaustive list of factors, we are told, may bear on the analysis: state-court opinion-writing practices, *ante*, at 8, 9; state-law precedents and whether and how they incorporate federal law, *ante*, at 8; substantiality of the federal

claim, *ante*, at 9; citations to federal cases in state-court opinions (or citations to state cases that contain citations to federal cases), *ante*, at 13–14; the degree of similarity between the federal and state claim, *ante*, at 15; a petitioner's "litigation strategy," *ante*, at 15–16; and other clues that may possibly illuminate the inner thought processes of a state-court judge. Only after conducting its own detective work does the Court conclude that the federal claim was not overlooked in this case.

This complex exercise is unnecessary. A judgment that denies relief *necessarily* denies—and thus adjudicates—*all* the claims a petitioner has raised. See 1 H. Black, Law of Judgments §1, p. 2 (2d ed. 1902) ("[T]he judgment necessarily affirms, or else denies, that [an alleged] duty or . . . liability rests upon the person against whom the aid of the law is invoked"); *id.*, §24, at 37. The judgment itself gives conclusive expression that the claims have been considered and rejected—*whatever* the individual judge might have been pondering (or not pondering). At common law the formal language traditionally preceding the announcement of a court's judgment was "*consideratum est per curiam*" ("It is considered by the court"). See Black's Law Dictionary 349–350 (9th ed. 2009); 1 Bouvier's Law Dictionary 619 (8th ed. 1914).

The Court maintains that "[i]f a federal claim is rejected as a result of sheer inadvertence, it has not been evaluated based on the intrinsic right and wrong of the matter," *ante*, at 12. Perhaps not, but it nonetheless may have been rejected "on the merits." That phrase does not suggest a line between a *considered* rejection of a claim and an *unconsidered, inadequately considered,* or *inadvertent* rejection. Rather, it refers to a "determination that there exist or do not exist grounds entitling a petitioner" to relief under his claim, as contrasted with a "denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Gonzalez* v. *Crosby*, 545 U. S. 524,

532, n. 4 (2005). An "adjudication on the merits" is "best understood by stating what it is not: it is not a resolution of a claim on procedural grounds." *Muth* v. *Frank*, 412 F. 3d 808, 815 (CA7 2005). And, as we have affirmed and reaffirmed recently, where a claim has been denied, but it is unclear from the record whether the denial was on the merits or on another basis, we presume the former. *Harrington* v. *Richter*, 562 U. S. ___, ___ (2011) (slip op., at 9–10) (citing *Harris* v. *Reed*, 489 U. S. 255, 265 (1989)); see also *Coleman* v. *Thompson*, 501 U. S. 722, 732–733 (1991).

We apply a presumption of merits determination in that sense not just with respect to §2254(d) but for other purposes as well. We have long applied it, for example, in determining whether a claim is barred by res judicata:

> "Ordinarily, such a question is answered by a mere inspection of the decree—the presumption being that a dismissal in equity, without qualifying words, is a final decision *on the merits*. That presumption of finality . . . disappears whenever the record shows that the court did not pass upon the merits but dismissed the bill because of a want of jurisdiction, for want of parties, because the suit was brought prematurely, because the plaintiff had a right to file a subsequent bill on the same subject-matter, or on any other ground not going to the merits." *Swift* v. *McPherson*, 232 U. S. 51, 55–56 (1914) (emphasis added); see also *Hubbell* v. *United States*, 171 U. S. 203, 207 (1898); *Durant* v. *Essex Co.*, 7 Wall. 107, 109 (1868).

We also apply a presumption of merits determination in the sense I have described for purposes of 28 U. S. C. §1257, which imposes a federal-question requirement as a condition of this Court's appellate jurisdiction. *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041 (1983). Indeed, the application of the presumption in direct-review cases was the genesis of the presumption in federal habeas cases.

The condition for federal habeas—that the federal question must have been addressed on the merits by the state courts—did not originate with the enactment of the Antiterrorism and Effective Death Penalty Act in 1996, but was established as early as 1977 in *Wainwright* v. *Sykes*, 433 U. S. 72, 81, 86–87. We described the assessment of whether that requirement was met as presenting "the same problem of ambiguity that this Court resolved in *Michigan* v. *Long*." *Harris*, 489 U. S., at 262. And indeed, we described the habeas requirement as an application of the "adequate and independent state ground doctrine," which inquires whether a "finding of procedural default will bar federal habeas review." *Ibid.* It is of course unthinkable that a state-court resolution of a federal question will escape our review under §1257 if it is inadvertent rather than intentional.

Given this background, there is no reason to believe that AEDPA established a new and peculiar regime in which the federal habeas court must make one assessment of whether the federal question has been decided "on the merits" for purposes of determining its authority to review the question (a *Long* assessment which counts, as §1257 cases count, inadvertent resolution of a federal question); and then must proceed to a different assessment of "on the merits" (one that does not count inadvertent resolution) for purposes of determining whether deference to the state-court judgment is required.

But, it will be argued, how can a court "defer" to a state-court determination that was in fact never made? Must not one first be sure it exists before one can accord it respect? The answer is no; according respect only to determinations that have for-sure been made is demonstrably not the scheme that AEDPA envisions. Federal habeas courts defer to state determinations that may in fact never have been made whenever they find a summary, unexplained rejection of a federal claim to be sustainable

(*e.g.*, not contrary to clearly established federal law as determined by this Court). The validating basis that the federal habeas court posits need not have been the one that the state court actually relied upon; the state court may well have applied a theory that was flat-out wrong, and may not have made the subsidiary determinations (including factual assessments) necessary to support the correct theory. That does not matter. For what is accorded deference is not the state court's reasoning but the state court's judgment, which is presumed to be supported by whatever valid support was available. See *Harrington*, *supra*, at ___ (slip op., at 12) ("Under §2254(d) a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision"). Indeed, the deference with regard to the basis of decision is much more "blind" than the deference I assert is necessary in the present case. I demand a state-court statement (contained in the unqualified terms of its judgment) that it has rejected the federal claim; I simply refuse to question the veracity of that statement. By contrast, no statement is ever even required that the state court relied upon the theory of federal law that the habeas court finds validating.

I doubt that the Court is prepared to abide by its novel interpretation of "on the merits" for purposes of §2254(d). Imagine that the state court formulated its judgment as follows: "All claims raised by the defendant have been considered and denied." I cannot believe that the Court would require federal courts to test the veracity of that statement. Yet, as we have described, that is precisely what an (unadorned) judgment denying relief *already conveys*. Although the Court acknowledges that "'[w]e have no power to tell state courts how they must write their opinions,'" *ante*, at 9, its analysis would turn solely on how the order of judgment is styled.

Resolution of this case is direct: Respondent's claim was

"adjudicated on the merits," because the state court rendered a judgment rejecting all her claims, and the judgment gave no indication (such as a statement that it was "without prejudice") that it was based on a procedural or other nonmerits ground.

The Court's novel resolution of the "on the merits" question produces a clear enough answer in this case. The weight of the evidence demonstrated that it was "exceedingly unlikely" that the state court overlooked the federal claim. *Ante*, at 16. But such ready resolution will not be commonplace. Consider another case, where the federal and state claims are *not* related, where there is *no* relevant state precedent referring to federal law, where state law might be interpreted as *less* defendant-friendly than the federal standard, or where a confluence of such factors exists. The answer to whether the federal claim has been "evaluated based on the intrinsic right and wrong of the matter" is anybody's guess. One thing, however, *is* certain: The Court's case-by-case approach will guarantee protracted litigation over whether a state-court judge was aware of a claim on the day he rejected it.

The Court tells us not to worry about a flood of litigation, because the Courts of Appeals have previously allowed arguments from petitioners that the state courts overlooked their federal claims. *Ante*, at 13, and n. 4 (citing cases). But many of those cases applied a much simpler (and even less justifiable) test than the one adopted today: if the federal claim was not addressed in the opinion, then it was not adjudicated on the merits. See, *e.g.*, *Lyell* v. *Renico*, 470 F. 3d 1177, 1181–1182 (CA6 2006); *Fortini* v. *Murphy*, 257 F. 3d 39, 47 (CA1 2001). And even those courts that attempted to "divin[e] the thought processes of" the judge limited their inquiry to "what a state court has *said*." *Brown* v. *Luebbers*, 371 F. 3d 458, 461 (CA8 2004) (emphasis added); see also, *e.g.*, *Chadwick* v. *Janecka*, 312 F. 3d 597, 606 (CA3 2002). By

contrast, the Court today asks whether a judge *thought* about the merits of an unaddressed claim, and leaves on the table any evidence relevant to that inquiry.

This newly-sponsored enterprise of probing the judicial mind is inappropriately intrusive upon state-court processes. Are federal habeas courts now to consider evidence relevant to the internal deliberations of the state judiciary? Can a petitioner introduce testimony showing that state-court judges—because of time constraints, heavy caseloads, or other reasons—fail to read the briefs but leave that to their assistants, whose recommendations they rarely reject? Or testimony showing that, typically, only one judge on the state-court appellate panel reads the briefs and considers all the claims, and the others simply join the drafted order? Has there been an "adjudication on the merits" then? Future litigation will supply the answers.

For these reasons, I do not join the opinion of the Court and concur only in the judgment.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

January 13, 2012

Clerk
United States Court of Appeals for the Ninth
Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: Javier Cavazos, Acting Warden
v. Tara Sheneva Williams
No. 11-465
(Your No. 07-56127)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to Question 1 presented by the petition.

Sincerely,

William K. Suter

William K. Suter, Clerk

Appendix H

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

April 15, 2013

Clerk
United States Court of Appeals for the Ninth
Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: Deborah K. Johnson, Acting Warden
v. Tara Sheneva Williams
No. 11-465
(Your No. 07-56127)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for rehearing is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk

FILED

DEC 17 2013

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TARA SHENEVA WILLIAMS, Petitioner - Appellant, v. DEBORAH K. JOHNSON, Acting Warden of the Central California Women's Facility in Chowchilla, Respondent - Appellee.	No. 07-56127 D.C. No. CV-03-02691-GW Central District of California, Los Angeles ORDER

Before: KOZINSKI, Chief Judge,, REINHARDT, Circuit Judge, and WHYTE, Senior District Judge.*

The petition for rehearing is denied.

---

* The Honorable Ronald M. Whyte, Senior District Judge for the U.S. District Court for the Northern District of California, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 13 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

TARA SHENEVA WILLIAMS,

Petitioner - Appellant,

v.

JAVIER CAVAZOS, Acting Warden of the Central California Women's Facility in Chowchilla, California Substituted for Gwendolyn Mitchell,

Respondent - Appellee.

No. 07-56127

D.C. No. CV-03-02691-GW
Central District of California,
Los Angeles

ORDER

Before: KOZINSKI, Chief Judge, REINHARDT, Circuit Judge, and WHYTE, Senior District Judge.*

The panel has voted unanimously to deny the petition for rehearing. Chief Judge Kozinski and Judge Reinhardt have voted to deny the suggestion for rehearing en banc, and Judge Whyte so recommends. The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and suggestion for rehearing en banc are denied.

* The Honorable Ronald M. Whyte, Senior District Judge for the U.S. District Court for Northern California, sitting by designation.

Appendix K

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

April 15, 2013

Clerk
United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, California 94119-3939

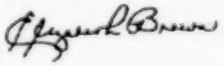
Re: Deborah K. Johnson, Acting Warden
v. Tara Sheneva Williams
No. 11-465 (Your docket No. 07-56127)

Dear Clerk:

Attached please find a certified copy of the judgment of this Court in the above-entitled case. You may obtain a copy of the opinion by visiting our website @www.supremecourt.gov.

Sincerely,

WILLIAM K. SUTER, Clerk

By 

Elizabeth Brown
Judgments/Mandates Clerk

Enc.
cc: Stephanie Brenan, Esq.
Kurt D. Hermansen, Esq.

Supreme Court of the United States

No. 11-465

DEBORAH K. JOHNSON, ACTING WARDEN,

Petitioner

v.

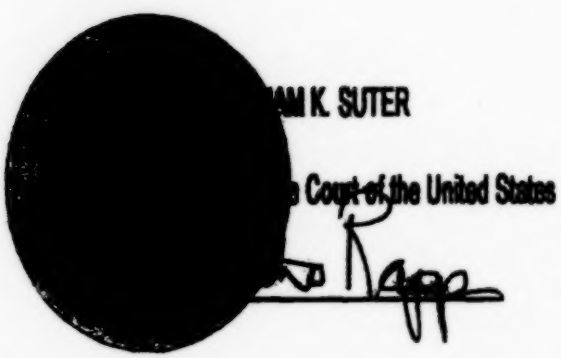
TARA SHENEVA WILLIAMS

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

THIS CAUSE came on to be heard on the transcript of the record from the above court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is reversed. The case is remanded to the United States Court of Appeals for the Ninth Circuit for further proceedings consistent with the opinion of this Court.

February 20, 2012



No. 11-465

In The
Supreme Court of the United States

DEBORAH K. JOHNSON, Acting Warden,

Petitioner,

v.

TARA SHENEVA WILLIAMS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR REHEARING

KURT DAVID HERMANSEN*
LAW OFFICE OF
KURT DAVID HERMANSEN
110 W. C St., Ste. 1903
San Diego, California 92101
(619) 236-8300
kdhermansen@gmail.com
**Counsel of Record*

STEVEN M. KLEPPER
KRAMON & GRAHAM, P.A.
One South St., Ste. 2600
Baltimore, Maryland 21202
(410) 752-6030
sklepper@kg-law.com

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

PETITION FOR REHEARING

Respondent Tara Sheneva Williams submits this petition for rehearing under Rule 44.1.

Ms. Williams requests rehearing for the limited purpose of clarifying that, on remand, she can continue to pursue habeas relief based on alternative grounds that the Ninth Circuit did not reach below, and on which this Court declined to grant certiorari.

1. The sole question addressed in this Court's opinion – the threshold question of whether AEDPA deference applied – was one that the Ninth Circuit raised sua sponte at oral argument. slip op. at 7, 16. The question that the parties briefed before the Ninth Circuit was whether Ms. Williams was entitled to relief under a deferential AEDPA analysis. The Ninth Circuit never reached the question that the parties briefed. Pet. App. 28a-30a.

Question 2 of the warden's petition, seeking full reversal and not simply remand for deferential review of Ms. Williams' substantive claim, asked this Court to conduct a deferential AEDPA analysis:

> Whether, under § 2254 [AEDPA], a federal habeas court (a) may grant relief on the ground that the petitioner had a Sixth Amendment right to retain a biased juror on the panel and (b) may reject a state court's finding of juror bias because it disagrees with the finding and the reasons stated for it, even where the finding was rationally

> supported by evidence in the state-court record.

Pet. at i.

But this Court declined to grant certiorari on Question 2, instead granting the petition "limited to Question 1 presented by the petition." *Cavazos v. Williams*, 132 S. Ct. 1088, 1088 (2012). The parties' merits briefs did not address Question 2 at all. Each side presented Question 1 as the one "Question Presented." *See* Petitioner's Merits Br. at i; Respondent's Merits Br. at i.

This Court ordinarily does not address questions outside a limited grant of certiorari, *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 253-54 (1999), and the Court ordinarily will provide some notice in advance of briefing and argument if it intends to do so. *Propper v. Clark*, 337 U.S. 472, 476 (1949).

Indeed, at oral argument the Court recognized that, although certain Justices took the opportunity to express that the mid-deliberations juror interrogation was "very troublesome," the merits of Ms. Williams' substantive claim were not before the Court. *See* Arg. Tr. at 19 ("JUSTICE KENNEDY: . . . [T]his takes us into the merits, which is really interesting, but . . . we probably shouldn't go there, but, as long as we're there for a minute I agree with Justice Ginsburg. I've never seen a procedure like this.").

2. This Court's reversal of the Ninth Circuit's ruling on the threshold standard of review should

allow Ms. Williams, on remand, to pursue her never-adjudicated claim for relief under AEDPA's deferential standard of review.

The Court's opinion acknowledged the limited grant of certiorari: "We granted the warden's petition for a writ of certiorari, 565 U.S. ___ (2012), in order to decide whether the Ninth Circuit erred by refusing to afford AEDPA deference to the California Court of Appeal's decision." slip op. at 7. The Court's legal analysis, at sections II and III of its opinion, addressed only that question. *Id.* at 7-16. Answering that single question in the affirmative and reversing "the Ninth Circuit's judgment to the contrary," the Court concluded by ordering that "[t]he case is remanded for further proceedings consistent with this opinion." *Id.* at 16.

But the warden seizes on 12 words in the introduction of the Court's opinion as putting Ms. Williams out of court. The sentence at issue reads:

> [W]e hold that the federal claim at issue here (a Sixth Amendment jury trial claim) must be presumed to have been adjudicated on the merits by the California courts, that this presumption was not adequately rebutted, that the restrictive standard of review set out in § 2254(d)(2) consequently applies, *and that under that standard respondent is not entitled to habeas relief.*

slip op. at 2 (emphasis added). Counsel have conferred, and the warden interprets this language as

precluding the Ninth Circuit from conducting deferential AEDPA review on remand.

By the warden's out-of-context interpretation, this language has the practical effect of the Court granting certiorari on Question 2 and resolving that question against Ms. Williams – without the benefit of either briefing or a decision below. It seems highly unlikely that the Court intended 12 words in the opinion's introduction to adjudicate Question 2. Nowhere in the body of the opinion (§§ I-III) does the Court conduct a deferential analysis of Ms. Williams' Sixth Amendment claim.

3. Although the Court rarely grants petitions for rehearing, this procedural posture presents a classic case for rehearing. For instance, in *Parks v. Simpson Timber Co.*, 389 U.S. 909 (1967), the Court ordered on rehearing:

> The *per curiam* opinion issued in this case on June 12, 1967, is hereby amended to provide that the judgment of the United States Court of Appeals for the Ninth Circuit be vacated rather than reversed, and that the case be remanded to that court in order that it may pass upon the issues in the case not covered by its prior opinion.

Id. at 909. *See Union Trust Co. v. E. Air Lines, Inc.*, 350 U.S. 962, 962 (1956) (on rehearing, "directing that the case be remanded to the Court of Appeals to permit that court to pass upon the several issues left undecided by our reversal of its judgment"). *See*

generally Eugene Gressman et al., SUPREME COURT PRACTICE 818 (9th ed. 2007).

Ms. Williams therefore requests that the Court, consistent with its denial of certiorari on Question 2, *Cavazos*, 132 S. Ct. at 1088, clarify that on remand the Ninth Circuit should adjudicate Ms. Williams' substantive claim under deferential AEDPA review (i.e., to delete, from slip. op. at 2, the following words: "and that under that standard respondent is not entitled to habeas relief.")

CONCLUSION

Ms. Williams asks that the Court grant rehearing for the limited purposes set forth herein.

Respectfully submitted,

KURT DAVID HERMANSEN*
LAW OFFICE OF
KURT DAVID HERMANSEN
110 W. C St., Ste. 1903
San Diego, California 92101
(619) 236-8300
kdhermansen@gmail.com

STEVEN M. KLEPPER
KRAMON & GRAHAM, P.A.
One South St., Ste. 2600
Baltimore, Maryland 21202
(410) 752-6030
sklepper@kg-law.com

*Counsel of Record

Counsel for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

- - - -

appellant has raised four arguments, is that a plain statement that the fifth -- the fifth argument was overlooked?

MS. BRENAN: I would say that it possibly could be if it were in that situation. However, I would -- I would still go back to -- to really, the Richter presumption of saying that that word at the end denied, denied is denied is denied, and it covers every fairly presented claim.

JUSTICE ALITO: That's not a plain statement? What if there is one Federal claim -- one Federal argument and five state arguments, and the opinion says, this appeal raises only issues of state law, is that a plain statement?

MS. BRENAN: Possibly it could be, Your Honor, but here we don't -- we don't have that situation.

JUSTICE GINSBURG: May I ask you about the underlying claim here? It is quite troublesome. I think this is a state that doesn't allow an Allen charge; is that right?

MS. BRENAN: Correct. Correct, Your Honor.

JUSTICE GINSBURG: And the possibility of getting rid of the juror, the hold-out juror, in this way is -- is really troublesome.

The judge can't give an Allen charge to urge the jury to deliberate further, but can say -- now, the judge knows who the hold-out is, and to just dismiss that juror, it is -- it is very troublesome.

MS. BRENAN: Well, Your Honor, the thing is that here we have a trial court who is looking at this juror and makes the determination that the juror is biased. And, therefore, if there was to be anything of any sort of constitutional violation, it would be to keeping that juror, a biased juror, on the jury. That would be a violation of the Sixth Amendment.

JUSTICE KENNEDY: Well, I have to -- I mean, this takes us into the merits, which is really interesting, but I -- we probably shouldn't go there, but, as long as we're there for a minute, I agree with Justice Ginsburg. I've never seen a procedure like this.

And I looked -- I looked at this -- the Federal cases, Brown and Thomas, that the Cleveland court cited. Those -- and Wood was voir dire, was not mid-jury.

I just hope this doesn't happen with much regularity. And the fact that the trial judge is upset, that's the reason that you should leave the jury alone, it seems to me. I think it's very troublesome.

MS. BRENAN: Well, Justice Kennedy, it's a situation where, through the voir dire, what comes out is not that we're trying to get -- that the trial judge is feeling to get rid of this juror because he's the hold-out juror, but it's because through the voir dire he determines that this juror is biased, and that is the bias, and that's what makes it different.

JUSTICE SOTOMAYOR: That the person is not guilty is a bias?

MS. BRENAN: No, Your Honor, that's certainly not it. It's the bias comes from what he was saying of his disagreement or -- that he just really did not believe with the felony murder rule. Therefore, it's that -- that under any evidence, whatever evidence was presented, that he would not be able to convict because he disagreed with the very basis of the law.

JUSTICE SOTOMAYOR: That -- that's -- that may be your strongest point, but most of what he said was basically this is a murder case, and the evidence has to be beyond a reasonable doubt, and I think it has to be clear enough for me to be convinced. Is that a biased juror?

MS. BRENAN: That is not a biased juror, but that's what he said to the court.

But what comes out through the voir dire of

the other jurors is not that he was using a reasonable doubt standard, but that he was using a no doubt standard, an absolute doubt standard.

And that's where he's not following the law, and that's where he's biased. And that's where he becomes a biased juror who has no right to be on that jury.

JUSTICE SOTOMAYOR: I must say that, like Justice Kennedy, I'm deeply troubled when trial judges intrude in the deliberative processes of juries.

Most of the time when we're assessing bias, we're assessing it on the grounds of extraneous evidence, a juror who has said one thing in voir dire and is now either a convicted felon or introduced extraneous circumstance.

But the degree of being convinced is the very essence of jury deliberations. This case is troublesome.

MS. BRENAN: Well, Your Honor, I believe in this situation it's one where the judge was presented with possible misconduct, and therefore had to do something. Had the judge done nothing, we could have possibly been in the same situation.

And under -- under California law, it's where this -- this examination cannot be so intrusive.

So we maintain that it was not. It was only to the degree in which we are finding that there was a biased juror. At that point in time, the Sixth Amendment required that that juror be removed.

JUSTICE KAGAN: Could I go back, Ms. Brenan, to your basic theory, because I guess I'm not sure I understand what you're arguing now.

In your brief, you talked about focusing on the error. So if evidence was admitted, you would say it doesn't matter that there were three different theories for why the admission of evidence was wrong; you should just look at the fact that we're talking about the admission of evidence. Now, is -- is that what you're arguing, or are you also saying what the states say in their amicus brief, that even if, you know, one claim is about the admission of evidence, and one claim is about ineffective assistance of counsel, you would still apply the same rule?

MS. BRENAN: What we're saying is that, at the very least, in our type of situation where -- where the court discusses the alleged error, there is an adjudication on the merits, but that plays into the larger and broader rule.

JUSTICE KAGAN: Well, why does your theory make any sense? I mean, we're supposed to be

Now, since your argument, the argument in the -- in this brief here is entirely Sixth Amendment, as far as I can tell, they say, look, look what happened here, they took this man off the jury. That violates my rights to Sixth Amendment right. It says it over and over and over. I have no doubt you raised it.

And now they give an answer. And the answer that they give consists of 30 lines, and 16 of the lines consist of Federal law.

So -- so what's the problem?

MR. HERMANSEN: The problem --

JUSTICE BREYER: The remaining 14 lines do consist of state law too; but, I mean, how can we say they didn't consider the Federal issue?

MR. HERMANSEN: Because Nesler doesn't talk one iota about kicking off the holdout juror.

JUSTICE BREYER: No, they didn't quote -- Nesler doesn't. What they did in Nesler is quote a Federal case. And what they do here is not just say Nesler, they quote the Federal case.

MR. HERMANSEN: And that Federal case has nothing to do with kicking off a holdout juror.

JUSTICE BREYER: Well, maybe it doesn't. Maybe they didn't properly -- maybe they didn't properly state what Federal law is. Everybody has some concerns

about that one.

But what I don't see is how when they spend 14 out of 27 lines quoting a Federal case which they believe sets the standard for impartiality and partiality you can say that they didn't discuss the Federal issue.

MR. HERMANSEN: You hit the nail right on the head, Justice Breyer, because they are talking about impartiality. That's all they're talking about. They're looking at a Federal case to see what the definition of impartiality is.

JUSTICE BREYER: For Constitutional purposes. And this guy was kicked off the jury because they thought he was not impartial.

MR. HERMANSEN: The bottom line is they did not apply the Federal rule. And the Federal rule is that if the juror's views on the merits of the case have been revealed, then the juror should not be kicked off.

JUSTICE BREYER: Well, then your claim over in the Ninth Circuit is not that they didn't consider it, but that, rather, they considered it, but no reasonable juror could reach -- no reasonable jurist could reach the conclusion that they reached on the issue.

That argument is open to you. The only

thing I don't understand is how you're saying -- or everybody -- I must be wrong, because everybody seems to be saying it -- that they didn't reach the Federal issue when they spent 14 lines discussing it, rightly or wrongly.

MR. HERMANSEN: Respectfully, Justice Breyer, they don't -- they're just talking about a definition of one word, of what actual bias is.

JUSTICE BREYER: Which happens to be the issue in this case.

MR. HERMANSEN: The issue in this case is can you kick off a juror who has expressed 10 or 15 times -- and this came out right out of the bat -- the foreperson was called out, asked about some notes and said, Juror No. 6, 10 or 15 times has said, I don't think there's sufficient evidence. So that's different from whether we look at Federal law to -- for the definition of actual bias.

My -- I think it's a reasonable position to say that you can't infer from this discussion of Nesler, only talking about what the definition of actual bias is, that the actual Sixth Amendment claim -- and even the trial attorney was arguing in Symington, Your Honor, please don't question these jurors. The foreperson, right out of the box said that Juror No. 6, 10 or 15

times, has already said that he thinks there isn't sufficient evidence.

JUSTICE BREYER: No. Now, what the court says about that argument, what the court of appeals says, is that the argument of your client not only misstates the evidence -- that's their -- not you, but they're criticizing -- and then he says, "It ignores the trial court's explanation that it was discharging Juror No. 6 because he had shown himself to be biased."

So this court of appeals thinks the issue is whether he had shown sufficient bias. You think the answer to that is clearly no. The Government thinks it's yes. And I can understand the differences of opinion, but I'm back to my question.

It seems to me in 14 lines they do address the Federal constitutional question of bias. And that's -- that's -- maybe it wasn't the right issue, et cetera, but -- or maybe they didn't decide it correctly.

But you see what's bothering me. And so I've listened to the answer. Do you want to add anything?

MR. HERMANSEN: I would respectfully request that, read -- that reading this whole thing in context, it's clear that the California Court of Appeals is

dealing with 1089. They are not dealing with the Federal standard that we're grappling with here, which is if a juror's views on the merits of a case have been expressed, can you then interrogate all the jurors --

JUSTICE SOTOMAYOR: Is this -- is this a holding that the Sixth Amendment requires you to keep a biased juror as long as the juror says, I have doubts about the sufficiency of the evidence?

MR. HERMANSEN: No. If there is good cause --

JUSTICE SOTOMAYOR: Now, answer my question. Does the Sixth Amendment require you to keep a biased juror?

MR. HERMANSEN: No.

JUSTICE SOTOMAYOR: All right. So, if the Sixth Amendment doesn't require you to keep a biased juror, then why is it that the state court's finding that this juror was biased a Sixth Amendment holding, that it wasn't violated because the juror was biased? The logic is almost inescapable to me.

MR. HERMANSEN: Yeah, right. So for a minute we'll get into the issue that wasn't certified, but what happened in this case was the judge -- the Ninth Circuit found that the finding of bias wasn't good cause under the Federal standard because the --

JUSTICE SOTOMAYOR: Did the California court find the juror was biased?

MR. HERMANSEN: Yes. Because he was applying too high of a standard because he said very convinced beyond a reasonable doubt, and there was a quibble about what does the word very add to beyond a reasonable doubt. And the jury very eloquently responded that very convinced beyond a reasonable doubt is the same as convinced beyond a reasonable doubt.

And so that doesn't show bias when someone --

JUSTICE BREYER: That was one of the things. Then they go through in those four pages about six other -- they called -- he gave one story to the judge, Juror No. 6.

Then the prosecution calls about eight other jurors, and they come up with quite a different story about what he was telling them in the jury room and -- that I'm not going to convict him. Well, he didn't quite say that; he was talking about Vietnam and talking about the slaves, and you don't want to convict a person for -- make him return the slave.

I mean, they talked about a lot of things. And he went through all that, and then concludes he was biased. And your point was he wasn't biased. He was

going to decide it fairly.

Okay, I'm listening.

MR. HERMANSEN: But the threshold issue is when the foreperson, at the very, very, very beginning, says, Juror No. 6, 10 or 15 times has said he doesn't think there is sufficient evidence, all questioning should have stopped at that point, because there was no indication of bias.

But -- and how do we know that there -- there's a possibility that he's being kicked off because of his views on the merits of the case? We know that because the prosecutor filed a motion saying, let's reopen questioning. And that -- then the judge said, okay, yeah, let's reopen questioning.

But the foreman had already said, I think your response to the jury note has satisfied that; I think it will be fine. Yet, the prosecutor filed a motion to reopen because the prosecutor knew that this juror had reasonable doubts.

And so that's why there's clear evidence in this case that the motion to dismiss the juror was based on the juror's views on the merits of the case.

And -- and, also, this is not a capital case, it's just a -- an LWOP case.

And if there are no further questions, thank

No. _____

In the Supreme Court of the United States

JAVIER CAVAZOS, ACTING WARDEN OF THE CENTRAL CALIFORNIA WOMEN'S FACILITY AT CHOWCHILLA, *Petitioner,*

v.

TARA SHENEVA WILLIAMS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
XIOMARA COSTELLO
Supervising Deputy Attorney General
STEPHANIE C. BRENAN
Deputy Attorney General
Counsel of Record
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2056
Fax: (213) 897-6496
Email: Stephanie.Brenan@doj.ca.gov
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a habeas petitioner's claim has been "adjudicated on the merits" for purposes of 28 U.S.C. § 2254(d) where the state court denied relief in an explained decision but did not expressly acknowledge a federal-law basis for the claim.

2. Whether, under § 2254, a federal habeas court (a) may grant relief on the ground that the petitioner had a Sixth Amendment right to retain a biased juror on the panel and (b) may reject a state court's finding of juror bias because it disagrees with the finding and the reasons stated for it, even where the finding was rationally supported by evidence in the state-court record.

* * *

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
MAY 14 2014
OFFICE OF THE CLERK

No. 13-9085

In the Supreme Court of the United States

TARA SHENEVA WILLIAMS,

Petitioner,

v.

DEBORAH K. JOHNSON, ACTING WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
State Solicitor General
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JAMES WILLIAM BILDERBACK II
Supervising Deputy Attorney General
STEPHANIE C. BRENAN
Deputy Attorney General
Counsel of Record
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2056
E-mail: Stephanie.Brenan@doj.ca.gov
Counsel for Respondent

QUESTION PRESENTED

Whether the Ninth Circuit on remand from this Court should have disregarded the statement in this Court's opinion that petitioner was not entitled to habeas relief where this Court had not granted certiorari on the question of petitioner's entitlement to relief and the statement was unaccompanied by a separate statement of reasons.

TABLE OF CONTENTS

Page

Statement of the Case 1

Reasons for Denying the Writ 7

Conclusion 15

TABLE OF AUTHORITIES

Page

CASES

Briggs v. *Pennsylvania R. Co.*
334 U.S. 304 (1948) 8

Cascade Natural Gas Corp. v. *El Paso Natural Gas Co.*
386 U.S. 129 (1967) 8

Estrada v. *Scribner*
512 F.3d 1227 (9th Cir. 2008) 14

Harrington v. *Richter*
562 U.S. __, 131 S. Ct. 770 (2011) 5

In re Sanford Fork & Tool Co.
160 U.S. 247 (1895) 8

Johnson v. *Williams*
133 S. Ct. 1088, *reh'g denied*, 133 S. Ct. 1858 (2013) ..... passim

Piper Aircraft Co. v. *Reyno*
454 U.S. 235 (1981) 10, 11

Redrup v. *New York*
386 U.S. 767 (1967) 12

Story Parchment Co. v. *Paterson Parchment Paper Co.*
282 U.S. 555 (1931) 12

United States v. *Locke*
471 U.S. 84 (1985) 11

United States v. *Wood*
299 U.S. 123 (1936) 14

Verizon Maryland Inc. v. *Public Serv[illegible]omm'n of Maryland*
534 U.S. 1072 (2001) 10

Williams v. *Johnson*
720 F.3d 1212 (9th Cir. 2013) 6, 7

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

28 U.S.C. § 1254(1) 9, 10, 12

28 U.S.C. § 2254 ..... passim

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI ..... passim

COURT RULES

S. Ct. R. 24.1 10

S. Ct. R. 26.2 13

STATEMENT OF THE CASE

The question presented in the certiorari petition arises from post-remand litigation following this Court's decision in *Johnson* v. *Williams*, 133 S. Ct. 1088, *reh'g denied*, 133 S. Ct. 1858 (2013).

1. This Court in *Williams* summarized the facts of the underlying crime and the trial as follows:

> In October 1993, [petitioner] Tara Williams took two of her friends for a drive in southern California with the objective of committing a robbery. They stopped at a liquor store in Long Beach, and while Williams waited in the getaway car, her fri[illegible] stole money from the cash register and fatally shot the store's owner. Williams then drove one of her friends away, and the other fled on foot. Williams avoided capture for five years but was ultimately apprehended and charged with first-degree murder.
>
> At trial, Williams admitted that she had served as the getaway driver but claimed that she did not know that her friends were going to rob the liquor store at the particular time in question. Instead, she contended that the three friends had agreed only that they would "case" the store and would possibly return later that evening to rob it. The State countered that, regardless of whether Williams knew precisely when and where the robbery was to take place, she had agreed to help commit a robbery and that this was sufficient to provide the predicate for felony murder under California law.
>
> After deliberating for about three hours, the jury foreman sent the judge two notes. The first note asked the following question:
>
> > " 'Is it legally permissible for a juror to interpret . . . the jury instructions to mean that the conspiracy should involve a plan to commit a specific robbery rather than a general plan to commit robberies in the future?' " Tr. 1247.
>
> The second note stated:
>
> > "I wish to inform you that we have one juror who has expressed an intention to disregard the law

> and . . . has expressed concern relative to the severity of the charge (first degree murder)." *Id.*, at 1246.
>
> The judge told the jury that the answer to the question in the first note was "no." *Id.*, at 1249. Then, over Williams' objection, the judge briefly questioned the foreman outside the presence of the rest of the jury about the second note. The foreman said that he thought the judge's answer to the first note might resolve the problem, and the judge instructed the jury to resume its deliberations.
>
> The next morning, once again over Williams' objection, the judge decided to inquire further about the foreman's second note. On questioning by the judge and lawyers for both parties, the foreman testified that Juror 6 had brought up past instances of jury nullification. The foreman also expressed doubt about whether Juror 6 was willing to apply the felony-murder rule. The trial judge then ordered questioning of Juror 6, who first denied and then admitted bringing up instances of nullification. Juror 6 also testified that this was a serious case and that he would vote to convict only if he was "very convinced . . . beyond a reasonable doubt." *Id.*, at 1280. He later clarified that in his view "convinced beyond a reasonable doubt" and "very convinced beyond a reasonable doubt" meant the same thing. *Id.*, at 1281. After taking testimony from the remaining jurors, who corroborated the foreman's testimony to varying degrees, the trial judge dismissed Juror 6 for bias. With an alternate juror in place, the jury convicted Williams of first-degree murder.

Pet. App. 72a-73a (ellipses in *Williams*).

Williams then challenged her conviction both in the state and federal courts, as this Court also described:

> On appeal to the California Court of Appeal, Williams argued, among other things, that the discharge of Juror 6 violated both the Sixth Amendment and the California Penal Code, which allows a California trial judge to dismiss a juror who "upon . . . good cause shown to the court is found to be unable to perform his or her duty." Cal. Penal Code Ann. § 1089 (West 2004). Although Williams' brief challenged the questioning and dismissal of Juror 6 on both state and federal grounds, it did not clearly distinguish between these two lines of authority.

In a written opinion affirming Williams' conviction, the California Court of Appeal devoted several pages to discussing the propriety of the trial judge's decision to dismiss the juror. *People* v. *Taylor*, No. B137365 (Mar. 27, 2001). The court held that Juror 6 had been properly dismissed for bias and quoted this Court's definition of "impartiality" in *United States* v. *Wood*, 299 U.S. 123, 145-146 (1936). But despite its extended discussion of Juror 6's dismissal and the questioning that preceded it, the California Court of Appeal never expressly acknowledged that it was deciding a Sixth Amendment issue.

Williams petitioned the California Supreme Court for review, and while her petition was pending, that court decided *People* v. *Cleveland*, 25 Cal. 4th 466, 21 P. 3d 1225 (2001), which held that a trial court had abused its discretion by dismissing for failure to deliberate a juror who appeared to disagree with the rest of the jury about the evidence. The California Supreme Court granted Williams' petition for review and remanded her case for further consideration in light of this intervening authority. *People* v. *Taylor*, No. S097387 (July 11, 2001).

On remand, the California Court of Appeal issued a revised opinion holding that the trial court had not abused its discretion by questioning the jury and dismissing Juror 6. Williams argued that Juror 6—like the holdout juror in *Cleveland*—was dismissed because he was uncooperative with other jurors who did not share his view of the evidence. But the California Court of Appeal disagreed, explaining that Williams' argument "not only misstate[d] the evidence," but also "ignore[d] the trial court's explanation that it was discharging Juror No. 6 because he had shown himself to be biased, *not* because he was failing to deliberate or engaging in juror nullification." *People* v. *Taylor*, No. B137365 (Jan. 18, 2002), App. to Pet. for Cert. 105a. As in its earlier opinion, the California Court of Appeal quoted our definition of juror bias in *Wood*, but the court did not expressly acknowledge that Williams had invoked a federal basis for her argument. Despite that omission, however, Williams did not seek rehearing or otherwise suggest that the court had overlooked her federal claim. Instead, she filed another petition for review in the California Supreme Court, but this time that court denied relief in a one-sentence order. *People* v. *Taylor*, No. S104661 (Apr. 10, 2002), App. to Pet. for Cert. 85a.

Williams sought but failed to obtain relief through state habeas proceedings, and she then filed a federal habeas petition under 28 U.S.C. § 2254. The District Court applied AEDPA's

> deferential standard of review for claims previously adjudicated on the merits and denied relief. *Williams* v. *Mitchell*, No. 03–2691 (CD Cal., May 30, 2007), App. to Pet. for Cert. 57a. In so holding, the District Court adopted a Magistrate Judge's finding that the evidence "amply support[ed] the trial judge's determination that good cause existed for the discharge of Juror 6." *Williams v. Mitchell*, No. 03–2691 (CD Cal., Mar. 19, 2007), *id.*, at 70a.
>
> The Ninth Circuit reversed. Unlike the District Court, the Ninth Circuit declined to apply the deferential standard of review contained in § 2254(d). The Ninth Circuit took this approach because it thought it "obvious" that the State Court of Appeal had "overlooked or disregarded" Williams' Sixth Amendment claim. [Footnote omitted.] *Williams* v. *Cavazos*, 646 F. 3d 626, 639 (2011). The Ninth Circuit reasoned that *Cleveland*, the State Supreme Court decision on which the State Court of Appeal had relied, "was not a constitutional decision," 646 F. 3d, at 640, and the Ninth Circuit attributed no significance to the state court's citation of our decision in *Wood*. Reviewing Williams' Sixth Amendment claim *de novo*, the Ninth Circuit applied its own precedent and held that the questioning and dismissal of Juror 6 violated the Sixth Amendment. 646 F. 3d, at 646-647. We granted the warden's petition for a writ of certiorari, 565 U.S. __ (2012), in order to decide whether the Ninth Circuit erred by refusing to afford AEDPA deference to the California Court of Appeal's decision.

Pet. App. 73a-76a (ellipsis in original)

2. The State filed a petition for a writ of certiorari raising two questions. The first question was "[w]hether a habeas petitioner's claim has been 'adjudicated on the merits' for purposes of 28 U.S.C. § 2254(d) where the state court denied relief in an explained decision but did not expressly acknowledge a federal-law basis for the claim." The second question was "[w]hether, under § 2254, a federal habeas court (a) may grant relief on the ground that the petitioner had a Sixth Amendment right to retain a biased juror on the panel and (b) may reject a state court's finding of juror bias

because it disagrees with the finding and the reasons stated for it, even where the finding was rationally supported by evidence in the state-court record." Pet. App. 119a. This Court granted certiorari, but only on the first question. *Id.* at 93a.

In its decision, this Court concluded that the rule of *Harrington* v. *Richter*, 562 U.S. __, 131 S. Ct. 770 (2011)—that a state court's summary denial order is presumed to be an adjudication on the merits of a federal claim—applies "when the state court addresses some of the claims raised by a defendant but not a claim that is later raised in a federal habeas proceeding." Pet. App. 71a. The Court then stated its holding as follows:

> Applying this rule in the present case, we hold that the federal claim at issue here (a Sixth Amendment jury trial claim) must be presumed to have been adjudicated on the merits by the California courts, that this presumption was not adequately rebutted, that the restrictive standard of review set out in § 2254(d)(2) consequently applies, *and that under that standard [Williams] is not entitled to habeas relief.* We therefore reverse the judgment of the Court of Appeals.

Id. (emphasis added). In the final sentence of the opinion, the Court stated: "The case is remanded for further proceedings consistent with this opinion." *Id.* at 85a.

3. Williams petitioned for rehearing, arguing that this Court had erred by including the last part of its holding—"under that standard [Williams] is not entitled to habeas relief"—in the opinion. Pet. App. 99a-104a. She noted that this Court had issued a limited grant of certiorari and

that the "body of the [Court's] opinion" did not contain a section 2254(d)(2) "deferential analysis of [her] Sixth Amendment claim." *Id.* at 103a. And she inferred that it was "highly unlikely" that this Court "intended" that clause to adjudicate her substantive claim. *Id.* at 100a-103a. She asked this Court to delete the twelve-word statement from the opinion so as to clarify that she could proceed on her claim on remand in the Ninth Circuit. *Id.* at 104a.

This Court summarily denied Williams' rehearing petition. Pet. App. 94a.

4. "In accordance with" this Court's opinion, and "taking note" of the Court's denial of rehearing, the Ninth Circuit on remand affirmed the district court's denial of habeas relief. *Williams* v. *Johnson*, 720 F.3d 1212 (9th Cir. 2013) (per curiam); Pet. App. 1a-2a. In separate concurring opinions, two judges explained that this Court's mandate (i.e., its holding in *Williams*) included its ruling that petitioner was not entitled to habeas relief and that the Ninth Circuit was required to follow that mandate. Pet. App. at 2a-5a (Reinhardt, J., concurring); *id.* at 5a-6a (Kozinski, C.J., concurring). Judge Reinhardt explained:

> We are, of course, required to follow the mandate of the Supreme Court. We are also required to assume that the Court meant what it said in the introduction of its opinion, in which it appears to have denied Williams's habeas claim, and that it fully considered the petition for rehearing when it refused to reconsider its decision. Given the introduction to the Court's opinion, and particularly its denial of the petition for rehearing, I believe that we have no option but to conclude that the Court has deliberately

> precluded us from considering the merits of Williams's habeas petition under AEDPA.

Id. at 5a (Reinhardt, J., concurring). Likewise, Chief Judge Kozinski stated that he had "no doubt" that this Court had "ruled on the issue" of whether "the trial judge's actions here complied with clearly established Supreme Court precedent" when it issued its *Williams* opinion "and it stood by that holding when it denied the petition for rehearing." *Id.* at 6a.

Williams sought rehearing in the Ninth Circuit on the ground that this Court's opinion did not foreclose consideration of her entitlement to relief on her Sixth Amendment claim. *Williams* v. *Johnson*, No. 07-56127, Reh. Pet. The Ninth Circuit denied Williams' petition. Pet. App. 95a.

REASONS FOR DENYING THE WRIT

Williams argues that the court of appeals erred in construing this Court's mandate to foreclose further consideration, on remand, of the merits of her Sixth Amendment claim (Pet. 10-17), and more broadly that this Court lacked jurisdiction to resolve that claim because it fell outside this Court's limited grant of certiorari (Pet. 17-22). Those arguments do not warrant review because the court of appeals correctly applied the mandate rule; it is well settled that a limited grant of certiorari does not operate as a jurisdictional bar to this Court's consideration of any question presented by a case; and Williams' underlying claim would not support relief under the deferential standard of review prescribed by 28 U.S.C. § 2254(d)—as the magistrate judge and the district court concluded in 2007.

1. Williams first argues (Pet. 10-17) that resolution of her Sixth Amendment claim was "plainly outside the compass of this Court's decision" (Pet. 14). As the court of appeals concluded, however, that position cannot be reconciled with the plain language of this Court's opinion. *See* Pet. App. 1a-6a.

This Court has "consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs* v. *Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948); see *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 136 (1967) ("No one, except this Court, has authority to alter or modify our mandate."). Thus:

> When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.

In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895).

Here, in addition, Williams' petition re-asserts arguments she previously made to this Court in her petition for rehearing petition (see Pet. App. 99a-104a), which this Court summarily denied (*id.* at 94a). In the rehearing petition, she observed that this Court had declined to grant certiorari on the Warden's Question 2. *Id.* at 101a. She makes the same observation here. Pet. 14. In the rehearing petition, she noted that the

Ninth Circuit had not reached the question whether she was entitled to relief under § 2254(d)'s deferential standard of review. Pet. App. 100a. Again, she notes the same thing here. Pet. 14. In her rehearing petition, she argued that some Justices were "trouble[d]" at oral argument by the mid-deliberation juror examination, i.e., "the merits of [her] substantive claim [that] were not before the Court." Pet. App. 101a. Here, she argues that four Justices "indicated at oral argument that Question 2 was troublesome but outside the scope of the Court's review." Pet. 14. In the rehearing petition, she noted that this Court's opinion acknowledged the limited grant of certiorari. Pet. App. 102a. She does the same here. Pet. 14.

Arguments concerning the intended scope of this Court's mandate that did not persuade the Court to amend its opinion promptly after it was issued, and that would affect only the parties to this case, do not warrant further review now.

2. Williams' second question presented reframes the first in jurisdictional terms. Pet. 17-22. She appears to argue that 28 U.S.C. § 1254(1) limits this Court's jurisdiction to questions upon which it has specifically granted certiorari, either expressly or by necessary implication. Pet. 18-19. It is, however, well settled that a limited grant of certiorari does not bar the Court from reaching any issue that the Court deems it appropriate to decide in order to resolve a "case" in which the Court has granted review under section 1254(1).

Williams contends that this Court "[n]ever has ... addressed the *jurisdictional* implications" of deciding questions outside a limited grant of certiorari. Pet. 18. But, as she acknowledges (Pet. 19), in *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 246 n.12 (1981), the Court expressly held that "An order limiting the grant of certiorari does not operate as a jurisdictional bar." Indeed, the Court's Rules specifically permit the Court to "consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide," S. Ct. R. 24.1(a)—a provision that would be impermissible if failure to grant review on a particular question raised any jurisdictional bar.

Williams contends that this Court has reached questions outside the original limited grant of certiorari only: (1) when it has expressly stated that it is doing so; (2) when it is necessary for the proper resolution of the case; or (3) in cases decided under the former jurisdictional statute, which did not contain "the 'granted' language of the present statute [28 U.S.C. § 1254(1)]." Pet. 20-21. She argues that none of those situations applies here, and that the Court's jurisdiction was therefore strictly confined to the standard-of-review question on which it had expressly granted certiorari. *Id.* There is, however, no authority for any such limitation.

As to the first point, this Court may make an express statement to "ensure" its "jurisdiction over all of the question at issue in th[e] case," and to afford parties a chance to brief a question before decision. See *Verizon*

Maryland Inc. v. *Public Service Comm'n of Maryland*, 534 U.S. 1072 (2001). Williams cites, however, no authority requiring, as prerequisite to jurisdiction, that this Court "affirmative[ly] declare[]" that it is reaching a question as a prerequisite to exercising jurisdiction. Pet. 20. There is none.

As to the second point, Williams acknowledges (Pet. 20) that this Court "may consider questions outside the scope of the limited order when resolution of those questions is necessary for the proper disposition of the case." *Piper Aircraft Co.*, 454 U.S. at 246 n.12 (and cases cited). She argues that "resolution of [the Warden's] Question 2 was [not] necessary to the proper resolution of antecedent Question 1." Pet. at 20. But *Piper Aircraft Co.* referred to the "proper disposition of *the case*." 454 U.S. at 246 n.12 (emphasis added). That reference corresponds to the language of section 1254(1), which authorizes the Court to review "[c]ases" on the petition of any party to the "case." Cf. *United States* v. *Locke*, 471 U.S. 84, 92 (1985) (appeal under former 28 U.S.C. § 1952, which authorized direct appeals from orders or judgments holding statutes unconstitutional, "br[ought] before this Court not merely the constitutional question decided below, but the entire case"). Within any given "case" under review by the Court, any limitation on reaching particular *issues* is a matter of prudence or discretion, not of jurisdiction.

Finally, as to Williams' third point—that cases where this Court has reached new questions were decided under the former jurisdictional statute—

Williams herself acknowledges that the Court has also reached such questions under the current statute, 28 U.S.C. § 1254(1). Pet. 21 (suggesting that the Court "potentially contravened § 1254(1)" when deciding *Redrup* v. *New York*, 386 U.S. 767 (1967)).

This Court had the power to decide that Williams' Sixth Amendment claim could not survive deferential review under § 2254(d) even though the Ninth Circuit in its original opinion had not applied § 2254(d) and no argument on the Sixth Amendment claim was presented to this Court in the merits briefing. In *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), this Court explained:

> Other assignments of error made on the appeal from the District Court were not considered by the court below. No argument in support of these assignments has been submitted here, and respondents assume that they will be remitted for the consideration of the court below if the judgment of that court be reversed. The entire record, however, is before this court with power to review the action of the Court of Appeals and direct such disposition of the case as that court might have made of it upon the appeal from the District Court. *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267, 30 S. Ct. 505, 54 L. Ed. 757; *Delk* v. *St. Louis & San Francisco R. R.*, 220 U. S. 580, 588, 31 S. Ct. 617, 55 L. Ed. 590. And *see Langnes* v. *Green*, *supra*. Accordingly, we have examined these assignments, some eight in number. One or more of them involve questions which have been disposed of by the foregoing opinion. We find nothing in any of the others of sufficient substance or materiality to call for consideration."

Id. at 567-68.

Here, similarly, this Court observed that the federal district court had "applied AEDPA's deferential standard of review for claims previously

adjudicated on the merits and denied relief." Pet. App. 75a. "In so holding," the Court explained, "the District Court adopted a Magistrate Judge's finding that the evidence 'amply support[ed] the trial judge's determination that good cause existed for the discharge of Juror 6.'" *Id.* (brackets in *Williams*). And the Court observed that, "[u]like the District Court, the Ninth Circuit declined to apply the deferential standard of review contained in § 2254(d)." *Id.*

Further, as in *Story Parchment Co.*, this Court had the entire case and record before it. See, e.g., S. Ct. R. 26.2. And the certiorari-stage pleadings sufficiently framed and briefed the substantive Sixth Amendment issue. See 11-465 Pet. 22-29; 11-465 Opp. 24-32; 11-465 Cert. Reply 7-9; see also Pet. 21 (noting that, under Williams' proposed jurisdictional rule, Court could enter an order formally expanding grant of certiorari and then "summarily decide the [new] question based on the certiorari-stage briefing, as it frequently does in habeas cases"). Thus, this Court had both the power and good reason to direct the disposition that the magistrate judge and the district court had concluded was appropriate on deferential AEDPA review, and that the Ninth Circuit should have affirmed.

3. Finally, further review is not warranted because the district court had good grounds for accepting the magistrate judge's recommendation and ruling that Williams' Sixth Amendment claim provides no basis for relief under sections 2254(d)(2) and (e)(1). The state trial judge removed a juror

after inquiring into the matter and concluding that the juror was biased. That determination was essentially one of credibility, and is a factual determination that precludes habeas relief in federal court because it was not "objectively unreasonable" in light of the state court record," (d)(2), and because Williams has not overcome it with "clear and convincing evidence" to the contrary, see (e)(1).

This Court's recitation of the facts of the examination of the juror in this case illustrates that the state-court record reasonably supported the state courts' finding of bias. Juror 6 initially denied but then admitted bringing instances of juror nullification to the attention of his fellow jurors; he stated he would vote to convict only if he were "'very convinced . . . beyond a reasonable doubt[]'"; and fellow jurors (to varying degrees) recounted that Juror 6 expressed unwillingness to apply the felony-murder rule to an aider and abettor. Pet. App. 73a (ellipsis in original).

An actually biased person—a person having "'a state of mind that leads to an inference that the person will not act with entire impartiality,'" *Estrada* v. *Scribner*, 512 F.3d 1227, 1240 (9th Cir. 2008)—may not served as a juror. *United States* v. *Wood*, 299 U.S. at 133 ("All persons otherwise qualified for jury service are subject to examination for actual bias."); *Estrada*, 512 F.3d at 1235 ("The presence of a biased juror is structural error."). Williams had no clearly established constitutional right to keep such a juror on the panel.

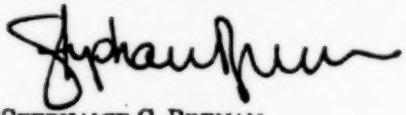
CONCLUSION

The petition for a writ certiorari should be denied.

Dated: May 14, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General Of California
EDWARD C. DUMONT
State Solicitor General
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JAMES WILLIAM BILDERBACK II
Supervising Deputy Attorney General



*STEPHANIE C. BRENAN
Deputy Attorney General
**Counsel of Record*
Counsel for Respondent

REPLY BRIEF

Supreme Court, U.S.
FILED
MAY 21 2014
OFFICE OF THE CLERK

No. 13-9085

IN THE

Supreme Court of the United States

DISTRIBUTED
JUN 4 - 2014

TARA SHENEVA WILLIAMS,

Petitioner,

v.

DEBORAH K. JOHNSON, Acting Warden,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

STEVEN M. KLEPPER
KRAMON & GRAHAM, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202-3201
(410) 752-6030
sklepper@kg-law.com

KURT DAVID HERMANSEN
Counsel of Record
LAW OFFICE OF KURT HERMANSEN
550 West C Street, Suite 580
San Diego, California 92101
(619) 236-8300
kdh@kurtdavidhermansen.com

COUNSEL FOR PETITIONER

RECEIVED
JUN - 3 2014
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 13-9085

IN THE

Supreme Court of the United States

TARA SHENEVA WILLIAMS,

Petitioner,

v.

DEBORAH K. JOHNSON, Acting Warden,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

STEVEN M. KLEPPER
KRAMON & GRAHAM, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202-3201
(410) 752-6030
sklepper@kg-law.com

KURT DAVID HERMANSEN
Counsel of Record
LAW OFFICE OF KURT HERMANSEN
550 West C Street, Suite 580
San Diego, California 92101
(619) 236-8300
kdh@kurtdavidhermansen.com

COUNSEL FOR PETITIONER

Reply Brief for the Petitioner

Tara Sheneva Williams submits this reply brief in support of her petition for a writ of certiorari.

1. On the mandate rule, the warden does not cite or distinguish *United States v. Navajo Nation*, 556 U.S. 287, 296 (2009) ("*Navajo II*"). Nor does she discuss the body of law governing a lower court's interpretation of a higher court's mandate. Thus, the warden overlooks the likelihood that this Court, in denying rehearing, intended for the Ninth Circuit to apply settled principles of the mandate rule on remand. The warden does not, and cannot, dispute that that a straightforward application of *Navajo II* permitted the Ninth Circuit to conduct deferential AEDPA review of Ms. Williams' Sixth Amendment claim on the merits.

Instead, the warden asks this Court to sweep this case under the rug. This case, however, is important. The Chief Judge of the Ninth Circuit has requested summary reversal. This posture is drawing attention.*

Denying certiorari would tread into dangerous new territory—drawing substantive guidance from this Court's summary denial of rehearing. With minimal effort, this Court can resolve this important problem. It need merely issue a short, summary reversal stating that, under established principles of *Navajo II*, the Ninth Circuit should conduct a deferential AEDPA review of Ms. Williams' claim.

---

* In addition to the secondary sources cited in the petition, see Will Baude, *Williams v. Johnson: A neglected cert petiton on a very troubling issue*, Volokh Conspiracy (Apr. 10, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/10/williams-v-johnson-a-neglected-cert-petition-on-a-very-troubling-issue/.

2. The warden takes an untenable approach to construing the Court's jurisdictional statute. Section 1254(1) is just 25 words—permitting review "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree"—but the warden quotes no more than one word at a time. Pet. Opp. 9–13. She has no explanation for how the denial of certiorari or rehearing can constitute "certiorari granted." None exists.

Rather, the warden cites instances where neither the parties nor the Court raised any jurisdictional question. The never-interpreted "certiorari granted" language of the jurisdictional statute, not some case resolved on prudential grounds, controls. This Court has rightly treated its statutory jurisdiction as a matter of vital importance throughout its history. Certiorari is appropriate.

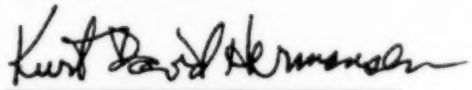
3. Though no appellate court has conducted a deferential AEDPA review of Ms. Williams' claim, the warden dismisses the task as unnecessary. At least half the Justices joining the Court's Opinion, however, believed that the question warranted serious consideration.

The unmistakable subtext of the warden's opposition is that the Ninth Circuit cannot be trusted to engage in deferential AEDPA analyses in the first instance. If Congress wanted to amend Section 1254 to bypass the Ninth Circuit and send such cases directly to this Court, it could do so. It has not. Chief Judge Kozinski has made clear that his mind is not made up. The panel has requested an opportunity to do its Article III job. This Court should grant it that opportunity.

CONCLUSION

This Court should grant certiorari, reverse the judgment below, and remand for deferential § 2254(d) adjudication of Ms. Williams' Sixth Amendment claim.

Respectfully submitted:



KURT DAVID HERMANSEN
Counsel of Record
LAW OFFICE OF KURT HERMANSEN
550 West C Street, Suite 580
San Diego, California 92101
(619) 236–8300
kdh@kurtdavidhermansen.com

STEVEN M. KLEPPER
KRAMON & GRAHAM, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202-3201
(410) 752-6030
sklepper@kg-law.com

COUNSEL FOR PETITIONER

Dated: May 21, 2014

No. 13-9085

IN THE

Supreme Court of the United States

TARA SHENEVA WILLIAMS,

Petitioner,

v.

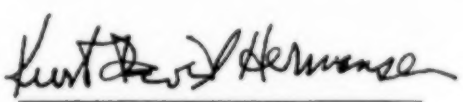
DEBORAH K. JOHNSON, Acting Warden,

Respondent.

CERTIFICATE OF SERVICE

I, Kurt David Hermansen a member of the Bar of this Court, certify that on May 21, 2014, as required by Supreme Court Rule 29, I have served the enclosed REPLY BRIEF FOR PETITIONER on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid. The person so served was Stephanie C. Brenan, Deputy Attorney General, 300 South Spring Street, Suite 1702, Los Angeles, California 90013, (213) 897-2056.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 21, 2014.



KURT DAVID HERMANSEN
LAW OFFICE OF KURT HERMANSEN
550 West C Street, Suite 580
San Diego, California 92101
(619) 236-8300
kdh@kurtdavidhermansen.com